APPENDIX A

Constitutional Provisions and Statutes Involved

U. S. Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Constitution, Amendment XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Louisiana Constitution, Article I, § 3

No law shall ever be passed to curtail or restrain the liberty of speech or of the press; any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.

Louisiana Constitution, Article I, § 6

All courts shall be open, and every person for injury done him in his rights, lands, goods, person or reputation

shall have adequate remedy by due process of law and justice administered without denial, partiality or unreasonable delay.

LOUISIANA CONSTITUTION, ARTICLE XIX, § 9

In all proceedings or indictments for libel, the truth thereof may be given in evidence. The jury in all criminal cases shall be the judges of the law and of the facts on the question of guilt or innocence, having been charged as to the law applicable to the case by the presiding judge.

LOUISIANA CIVIL CODE, ARTICLE 2315, FIRST SENTENCE

Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

LOUISIANA CODE OF CIVIL PROCEDURE, ARTICLE 74

An action for the recovery of damages for an offense or quasi offense may be brought in the parish where the wrongful conduct occurred, or in the parish where the damages were sustained. An action to enjoin the commission of an offense or quasi offense may be brought in the parish where the wrongful conduct occurred or may occur.

As used herein, the words "offense or quasi offense" include a nuisance and a violation of Article 667 of the Civil Code.

LOUISIANA REVISED STATUTES, TITLE 13, § 3602

Whenever any civil suit for slander, defamation, or for a libel, shall be instituted in any court of this state, it shall

be lawful for the defendant to plead in justification the truth of the slanderous, defamatory or libelous words or matter, for the uttering or publishing of which he may be sued; and in the trial of the issue in such suit, to maintain and prove his plea by all legal evidence.

LOUISIANA REVISED STATUTES, TITLE 14, § 47

Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends:

(1) To expose any person to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse; or

(2) To expose the memory of one deceased to hatred, contempt, or ridicule; or

(3) To injure any person, corporation, or association of persons in his or their business or occupation.

Whoever commits the crime of defamation shall be fined not more than three thousand dollars, or imprisoned for not more than one year, or both.

LOUISIANA REVISED STATUTES, TITLE 14, § 48

Where a non-privileged defamatory publication or expression is false it is presumed to be malicious unless a justifiable motive for making it is shown.

Where such a publication or expression is true, actual malice must be proved in order to convict the offender.

Appendix A

LOUISIANA REVISED STATUTES, TITLE 14, § 49

A qualified privilege exists and actual malice must be proved, regardless of whether the publication is true or false, in the following situations:

(1) Where the publication or expression is a fair and true report of any judicial, legislative, or other public or official proceeding, or of any statement, speech, argument, or debate in the course of the same.

(2) Where the publication or expression is a comment made in the reasonable belief of its truth, upon,

(a) The conduct of a person in respect to public affairs; or

(b) A thing which the proprietor thereof offers or explains to the public.

(3) Where the publication or expression is made to a person interested in the communication, by one who is also interested or who stands in such a relation to the former as to afford a reasonable ground for supposing his motive innocent.

(4) Where the publication or expression is made by an attorney or party in a judicial proceeding.

APPENDIX B

Opinions, Judgments and Decrees Below

(a) Opinion of the First Judicial District Court, Caddo Parish, Louisiana, on Exception of Improper Venue

EDWIN A. WALKER

vs.

ASSOCIATED PRESS, ET AL

Number 160,536

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

OPINION ON EXCEPTION OF IMPROPER VENUE

The plaintiff, a resident of the State of Texas, filed this suit against the Associated Press and the Times Picayune Publishing Corporation to recover the sum of Three Million Dollars ($3,000,000.00) as damages sustained by the plaintiff as a result of certain defamatory statements allegedly published by the defendants. The Associated Press is a corporation organized under and existing pursuant to the laws of the State of New York. Its only office and place of business in the State of Louisiana is located in Orleans Parish. The Times Picayune Publishing Corporation is a corporation organized under the laws of the State of Louisiana with its registered corporate office and principal place of business located in Orleans Parish.

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The plaintiff alleges that the Times Picayune Publishing Corporation published in its two newspapers, the Times Picayune and the New Orleans States-Item, certain false, libelous, and defamatory news reports concerning the plaintiff which were furnished to it by the Associated Press. The petition alleges that these newspapers were mailed to subscribers and distributed in Caddo Parish although both papers are published in the City of New Orleans. The petition also alleges that these newspapers were circulated and delivered to subscribers, news stands, and news agencies not only in Caddo Parish but throughout the State of Louisiana and other states of the United States and in foreign countries. The plaintiff claims the libelous statements and publications made by both defendants herein were intended and calculated to convey and did convey to the readers thereof defamatory imputations on petitioner injurious to his reputation and exposed him to public hatred, contempt, and ridicule.

C. C. P. Article 42 says: "The general rules of venue are that an action against:

(2) A domestic corporation, or a domestic insurer, shall be brought in the parish where its registered office is located;

(5) A foreign corporation not licensed to do business in the state shall be brought in a parish where the process may be, and subsequently is, served on the defendant."

C. C. P. Article 74 says: "An action for the recovery of damages for an offence [sic] or quasi offense may be brought in the parish where the wrongful conduct occurred, *or in the parish where the damages were sustained.*"

Appendix B

The early common law rule which originated in 1849 was that each sale or delivery of a single copy of a newspaper or magazine was a distinct and separate publication of the libel therein contained and gave rise to a separate cause of action. This rule was set out in the case of *Duke of Brunswick vs. Harmer,* 117 Eng. Rep. 72, and under it each time a libelous article is brought to the attention of a third person a new publication has occurred and each publication is a separate tort.

The great majority or American courts have now rejected the rule of the Duke of Brunswick case and adopted what is known as a "single publication" rule. This single publication rule says in effect that the publication of a defamatory statement in a newspaper or magazine, although such publication consists of thousands of copies widely distributed, is in legal effect one publication which gives rise to one cause of action.

In the case of *Brian vs. Harper,* 144 La. 585, 80 So. 885, our State Supreme Court said, "It is too well settled to require citation of authority that a libel committed by publication in a newspaper is accomplished when the publication goes into circulation." Therefore, under this authority together with C. C. P. Articles 42 and 74 there can be no question but that the courts of Orleans Parish would have jurisdiction in this case. However, the plaintiff argues that under C. C. P. Article 74 and the cases of *Vicknair vs. Daily States Publishing Company,* 144 La. 809, 81 So. 324, and *Mulina vs. Item Company,* 217 La. 842, 47 So. 2d 560, the courts of Caddo Parish also have jurisdiction over this question.

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In the case of *Vicknair vs. Daily States Publishing Co.* our Supreme Court held that a party who lived in Jefferson Parish could bring a suit against the Daily States, which was domiciled in Orleans Parish, in Jefferson Parish for an alleged libelous publication. It is interesting to note in the Vicknair case that the petition alleged only such damages as was suffered by the plaintiff in Jefferson Parish and did not seek to recover damages outside of that parish. Our Supreme Court also held, to the same effect, in the *Mulina vs. Item Company* case where the sheriff of Washington Parish brought a suit against the Orleans Parish newspaper for libel in Washington Parish. Although the petition in the Mulina case is not quoted, it is obvious from reading the case the plaintiff was only seeking damages that occurred to him in Washington Parish. Therefore it seems to us if the aggrieved party wishes to confine his damage to that sustained in one parish he may do so under these decisions. However, that is not the plaintiff's purpose in the present case. As we understand the plaintiff's position, he is seeking to recover damages in Caddo Parish for injury to his reputation not only in this parish, but throughout the State of Louisiana, the United States, and foreign countries. Under the provision of C. C. P. Article 74 which says an action for damages for an offense may be brought in *the* parish where the *damages* were sustained and the authorities herein above cited we think the plaintiff could only maintain this suit in Caddo Parish for such damages as were sustained in this parish.

C. C. P. Article 121 provides: "When an action is brought in a court of improper venue, the court may dismiss the action, or in the interest of justice transfer it to a court of proper venue."

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Therefore for the above and foregoing reasons this case is hereby ordered transferred to the Civil District Court in and for the Parish of Orleans.

There are several other pleadings which have been filed in this case. A decision on which we think should await the final determination of the question of proper venue.

/s/ WILLIAM F. WOODS
Judge

December 11, 1963

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(b) Judgment of the First Judicial District Court, Caddo Parish, Louisiana, on Exception of Improper Venue

EDWIN A. WALKER

vs.

THE ASSOCIATED PRESS ET AL.

Number 160,536

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

JUDGMENT

This cause having come on to be heard on November 26, 1963, on Exceptions of Improper Venue, Exceptions of Improper Cumulation of Actions and Misjoinder of Party Defendants and Exceptions of Vagueness and Ambiguity of Petition, filed seperately by both defendants, The Associated Press and the Times Picayune Publishing Corporation, and Exceptions of Insufficiency of Citation and Service of Process filed by defendant, the Times Picayune Publishing Corporation, after having been regularly set down for argument, and the cause having been duly submitted to the Court for adjudication, and the Court considering the law and the evidence to be in favor of defendants, The Associated Press and the Times Picayune Publishing Corporation, on the Exceptions of Improper Venue, for the reasons assigned in the written opinion of this Court dated December 11, 1963, and the Court considering it unnecessary to decide at this time the other exceptions filed by defendants,

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IT IS ORDERED, ADJUDGED and DECREED that the Exceptions of Improper Venue filed by defendants, The Associated Press and the Times Picayune Publishing Corporation, be and they are hereby sustained.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that this cause be and it is hereby ordered transferred to the Civil Distrfict Court in and for the Parish of Orleans, State of Louisiana, pursuant to the provisions of Article 121 of the Louisiana Code of Civil Procedure and LSA R. S. 13:3271-13:3275, provided that the plaintiff shall timely pay all costs and fees required by law to be paid in connection with the transfer and do all other things required by law to be done by him, within the delays, if any, allowed therefor, in order to effectuate the transfer of this cause to the Civil District Court in and for the Parish of Orleans, State of Louisiana, saving and reserving to defendants, however, all of their rights under the Exceptions of Improper Cumulation of Actions, Exceptions of Misjoinder of Party Defendants and Exceptions of Vagueness and Ambiguity of Petition heretofore filed herein by both defendants and the rights of the Times Picayune Publishing Corporation under the Exceptions of Insufficiency of Citation and Service of Process heretofore filed herein by it, without prejudice in any way by reason of the transfer herein ordered.

JUDGMENT RENDERED, READ and SIGNED in Open Court this 17th day of December, 1963.

/s/ WILLIAM F. WOODS
Judge,
First Judicial District Court,
Caddo Parish, Louisiana.

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(c) Opinion and Judgment of the Court of Appeal, Second Circuit, State of Louisiana, on Exception of Improper Venue

No. 10161

COURT OF APPEAL

SECOND CIRCUIT—STATE OF LOUISIANA

EDWIN A. WALKER,

Plaintiff-Relator

v.

THE ASSOCIATED PRESS and THE TIMES-PICAYUNE PUBLISHING CORPORATION,

Defendants-Respondents

In re Edwin A. Walker, plaintiff, applying for writs or certiorari, mandamus, and prohibition to the First Judicial District Court in and for Caddo Parish, Louisiana.

HON. WILLIAM F. WOODS, *Judge*

Wilkinson, Lewis, Woods & Carmody,
Attorneys for Plaintiff-Relator

Hargrove, Guyton, Van Hook and Ramey,
Attorneys for The Associated Press,
defendant-respondent [sic]

Phelps, Dunbar, Marks, Claverie & Sims,
Attorneys for
The Times-Picayune Publishing Corporation,
defendant-respondent [sic]

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Hon. George W. Hardy, Jr.
Hon. Edward L. Gladney
Hon. H. W. Ayres
Hon. James E. Bolin
Judges

AYRES, *J.*

This is an action in tort instituted against the defendants in the First Judicial District Court in and for Caddo Parish, Louisiana. Plaintiff seeks to recover damages for libel.

Writs were issued under our supervisory powers to permit a review of and to inquire into the validity of an order sustaining an exception of improper venue of the court and transferring this cause, under the provisions of C. C. P. Art. 121, to the Civil District Court in and for the Parish of Orleans.

The defendant The Times-Picayune Publishing Corporation, publisher of both The Times-Picayune and the New Orleans States-Item, morning and afternoon daily newspapers, respectively, is a Louisiana corporation with its domicile and principal place of business in the City of New Orleans, Orleans Parish, Louisiana. The defendant The Associated Press, a corporation organized and created under the laws of the State of New York, although not licensed to do business in this State, has an office located in and is doing business in the City of New Orleans, Orleans Parish, Louisiana.

The contention that the First Judicial District Court in and for Caddo Parish, Louisiana, has jurisdiction of this cause of action and is a court of proper venue is predicated on the fact that the defendants published and circulated certain defamatory statements concerning plaintiff in Caddo Parish; that The Associated Press gathered the news which

was sent by teletype to newspapers, radio and television stations in Louisiana, including those in Caddo Parish, as well as The Times-Picayune in New Orleans; and that The Times-Picayune Publishing Corporation published and circulated the libelous matter furnished it by its codefendant in newspapers which it sold and distributed in Caddo Parish, Louisiana. In this regard, plaintiff's petition specifically alleges:

> "The Associated Press operates a news gathering and news disseminating business and in such business employs agents in Louisiana, in other states of the Union, and in foreign countries for the purpose of gathering news which it dispatches to various newspapers, radio broadcasting stations and television broadcasting stations in Louisiana, in other states and in other countries. For such services this defendant makes charges and collects fees which produce a large profit. For such purposes said defendant maintains a regional bureau in the City of New Orleans from which its agents and employees telegraph news information to newspapers and radio and television broadcasting stations in Caddo Parish, in the State of Louisiana, and elsewhere.
>
> "The Times Picayune Publishing Corporation publishes in the City of New Orleans two daily newspapers, the morning newspaper being known as the Times Picayune, and the afternoon newspaper being known as the New Orleans States-Item; both of its said newspapers are mailed to subscribers in Shreveport and Caddo Parish and are distributed in said State and Parish through news agencies and news stands located therein. In addition the said

> newspapers are distributed throughout the State of Louisiana, in other states of the Union, and in foreign countries with a circulation of several million newspapers daily."

The general rule is that an action against a domestic corporation shall be brought in the parish where its registered office is located (C. C. P. Art. 42 (2)), the parish of its domicile (LSA-R. S. 12:37 (A)), and that an action against a foreign corporation not licensed to do business in this State shall be brought in the parish where process may be, and is, served on the defendant (C. C. P. Art. 42 (5)). Under the statement of facts recited hereinabove, the Civil District Court of the Parish of Orleans would, of course, under the general rule, constitute a court of proper venue in which this action could be maintained.

However, there are exceptions to the aforesaid general rule. For instance, under C. C. P. Art. 74, it is stated, so far as pertinent, that

> "An action for the recovery of damages for an offense or quasi offense may be brought in the parish *where the wrongful conduct occurred,* or in *the parish where the damages were sustained.*" (Emphasis supplied.)

A similar provision, although not as broad as the provisions in the Code of Civil Procedure, was contained in Art. 165 of the Code of Practice prior to the adoption of the Code of Civil Procedure.

Under the provisions of the Code of Practice, it was held, in Vicknair v. Daily States Pub. Co., Limited, 144 La. 809, 81 So. 324, that an action for damages for libel might be brought in the parish where a newspaper containing the

libelous matter was circulated. An exception to the jurisdiction of the court predicated upon the fact that the defendant was domiciled in the Parish of Orleans was overruled, whereupon the defendant applied to the Supreme Court for writs to prevent further proceedings by the District Court of Jefferson Parish. Plaintiff's petition alleged:

> "Now your petitioner shows that said Daily States Publishing Company, Limited, through its agents, circulated in the parish of Jefferson said false and malicious libel of and concerning your petitioner's said minor daughter, and that thereby the petitioner's said daughter has suffered damages in the sum of fifteen thousand dollars."

Although the newspaper was obviously printed in Orleans Parish, the court concluded that the circulation of the newspaper in Jefferson Parish by defendant through its agents was essentially a part of the alleged libelous acts or facts, and, therefore, under the language of Art. 165 of the Code of Practice, paragraph 9, providing that, in cases where any corporation shall commit trespass, or do or fail to do anything for which an action for damage lies, it may be "sued in the parish where such damage is done or trespass committed," the court had jurisdiction. In this regard, the court stated:

> "If defendant circulated or caused to be circulated the matter in question, and if it be libelous, and if the plaintiff's daughter has been damaged thereby, it would seem that, under the provisions of law just quoted, the courts of that parish would have jurisdiction to determine the matter." (81 So. 324, 325.)

Therefore, the ruling of the trial court, of which defendant complained, was upheld. The matter was again before the court, under the same title, 153 La. 676, 96 So. 529. In that opinion, it was stated:

> "The exception to the jurisdiction of the Twenty-Eighth judicial district court for the parish of Jefferson, was disposed of by proof of publication of said libel in the parish of Jefferson on the trial of the case." (96 So. 529, 530.)

The defendants are sued as joint tort-feasors. Plaintiff's petition alleges that The Associated Press was the author of the libelous matter which it presented to The Times-Picayune Publishing Corporation for publication, and that the latter published the libel and circulated its publications containing the libel in Caddo Parish and elsewhere. An action against joint or solidary obligors may be brought in any parish where such action may be maintained against either.

This conclusion is in accord with the provisions of C. C. P. Arts. 43, 45, and 73. The general rules relative to venue, as contained in Art. 42, are subject to the exceptions provided in Arts. 71 through 83 and as otherwise provided by law (C. C. P. Art. 43). C. C. P. Art. 45 provides that, where there is a conflict between two or more of Arts. 42 and 71 through 77, the plaintiff may bring the action in any venue provided by any applicable article. Such applicable article is Art. 74 under which, as heretofore observed, an action for the recovery of damages for an offense or quasi offense may be brought in the parish where the wrongful conduct occurred or in the parish where the damages were sustained.

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This rule is clearly applicable to actions against joint tort-feasors. It would indeed be an anomaly to hold that, whereas each of two or more trespassers or wrongdoers may be sued in the parish where the wrongful conduct occurred or in the parish where the damages were sustained, an action against them jointly, or in solido, could not be maintained in such parish. Such, clearly, was not the legislative intent.

In Wisemore v. First Nat. Life Ins. Co., 190 La. 1011, 183 So. 247, an insurance company and its agent were sued jointly and in solido because of certain alleged slanderous statements made by the agent in the course of his principal's business. The court held that the suit could be brought at the domicile of either one of the parties defendant or at the place where the slanderous statements were made. Cited by the court as authority was the case of Jones v. Maestri, 170 La. 290, 127 So. 631, 632, wherein it was stated:

> "Joint tort-feasors are solidarily liable and may be sued jointly either in the parish where the tort was committed or at the domicile of any one of the joint tort-feasors. Civ. Code art. 2324; Code of Practice, art. 165, §§ 6, 8 and 9, as amended by Act 130 of 1926; Rathborne Lumber Co. v. Cooper, 164 La. 502, 114 So. 112."

See, also:

Gardiner v. Erskine et al, 170 La. 212, 127 So. 604.

In Mulina v. Item Co., Inc., 217 La. 142, 47 So. 2d 560, the plaintiff brought an action in the Twenty-Second

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Judicial District Court for Washington Parish, Louisiana, for damages for an alleged libel appearing in the May 17, 1947, issue of the New Orleans Item. At the time of the publication, plaintiff was sheriff of Washington Parish. The origin of the publication was at the domicile of the newspaper in the City of New Orleans, Orleans Parish, Louisiana. To plaintiff's action, defendant filed an exception to the jurisdiction of the court ratione personae. This exception was overruled by the district court, which ruling was upheld by the Supreme Court.

The fact that plaintiff is not a resident of Caddo Parish does not divest the court of that Parish of jurisdiction to redress wrongs committed against him there. None of the decisions quoted sustained the jurisdiction of the trial court on the premise that plaintiff was a resident of the parish in whose court the action was instituted. To the contrary, venue was upheld because the libel was circulated there.

Likewise, C. C. P. Art. 74 makes no reference, in fixing venue, to plaintiff's residence but rather to the locus of the wrongful conduct or damage. From this article, it clearly appears that an action in tort may be brought in the parish *where the wrongful conduct occurred,* or in the parish *where the damages were sustained.*

The wrongful conduct, the circulation of the libel, is shown to have occurred in Caddo Parish; damages to plaintiff were also shown to have been sustained in that Parish. It appears, from the written opinion, the trial court was of the opinion that the court had jurisdiction of this action so far as the same relates to damage sustained in that Parish. In this regard, reference was made to the Vicknair and Mulina cases, supra, wherein it was stated that obviously the plaintiffs were seeking only such damages as occurred to them in the parishes in which they lived. As we appreciate these cases, we do not understand that the

damages recoverable were limited to the parish where the suit was filed or that plaintiff's claim must be limited to damages suffered at his place of residence.

No such limitation is contained in C. C. P. Art. 74. This article, as stated, establishes venue in the parish where the wrongful conduct occurred, that is, in this case, in the parish where the libel was circulated. Actions for defamation are generally considered transitory, and the provision "where the damages were sustained" of C. C. P. Art. 74 is in the alternative.

Nor does the provision of C. C. P. Art. 74 limit the damages recoverable to those sustained only in the parish where the suit is filed. The general rule supports this view. Thus, in 53 C. J. S., p. 241, "Libel and Slander," § 158, "Jurisdiction and Venue," it is stated:

* * *

> "An action may lie in one state for words published in another state where such words are slanderous at common law, or are actionable by the law of the forum, in the absence of proof of the law of the state in which published, or are actionable by the laws of such other state. * * *"

Nor do we find any basis for defendants' complaint that, under C. C. P. Art. 74, plaintiff may not only maintain an action in Caddo Parish but also in every parish of the state in which defendants' publications were circulated. The all-inclusive character of paintiff's action exeludes any basis for such a fear or apprehension, for C. C. P. Arts. 531 and 532 provide the defendants with appropriate relief. These articles provide:

Art. 531.

"When two or more suits are pending in a Louisiana court or courts on the same cause of action,

between the same parties in the same capacities, and having the same object, the defendant may have all but the first suit dismissed by excepting thereto as provided in Article 925. When the defendant does not so except, the plaintiff may continue the prosecution of any of the suits, but the first final judgment rendered shall be conclusive of all."

Art. 532.

"When a suit is brought in a Louisiana court while another is pending in a court of another state or of the United States on the same cause of action, between the same parties in the same capacities, and having the same object, on motion of the defendant or on its own motion, the court may stay all proceedings in the second suit until the first has been discontinued or final judgment has been rendered."

Moreover, if the action proceeds to judgment, the defendants would be adequately and fully protected under the principle and plea of res judicata. LSA-C.C. Art. 2286 provides:

"The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality."

Moreover, defendants, as to actions which may be brought in other states or jurisdictions, are further pro-

tected by the full faith and credit clause of the Constitution of the United States, Art. IV, Sec. 1, which provides that

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. * * * *"

For the reasons assigned, we conclude that the District Court for Caddo Parish is a court of proper venue and that it was error to transfer this cause to the Civil District Court of Orleans Parish.

Therefore, it is now Ordered, Adjudged, and Decreed that the writs of certiorari, prohibition, and mandamus heretofore issued herein are perpetuated and made final; and, accordingly,

It is further Ordered, Adjudged, and Decreed that the judgment sustaining the exceptions of improper venue filed and urged by the defendants, The Associated Press and The Times-Picayune Publishing Corporation, be, and it is hereby, annulled, avoided, reversed, and set aside, and said exceptions are now overruled; and

It is further Ordered, Adjudged, and Decreed that the order transferring this cause to the Civil District Court in and for the Parish of Orleans, State of Louisiana, be, and the same is hereby, annulled, avoided, reversed, and set aside; and, accordingly, this cause is hereby remanded to the Honorable, the First Judicial District Court in and for Caddo Parish, Louisiana, for further proceedings consistent with the views herein expressed and in accordance with law.

The defendants are taxed with such costs as have been incurred in this court; the taxation of all other costs are to await final determination of this cause.

Reversed and remanded.

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(d) Memorandum of the Supreme Court of Louisiana on Exception of Improper Venue

SUPREME COURT OF LOUISIANA
New Orleans, 70112
June 8, 1964

No. 47,286

EDWIN A. WALKER

v.

THE ASSOCIATED PRESS and THE TIMES-PICAYUNE PUBLISHING CORPORATION

In re: The Associated Press and The Times-Picayune Publishing Corporation applying for certiorari, or writ of review, to the Court of Appeal, Second Circuit, Parish of Caddo

Writ refused.
The judgment is correct.

/s/ JBH
/s/ FWH
/s/ EHMcC
/s/ FWS

FOURNET, C. J., is of the opinion the writ should be granted.
HAMLIN, J., is of the opinion the writ should be granted.

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(c) Per Curiam Decision of the United States Supreme Court on Exception of Improper Venue

ASSOCIATED PRESS ET AL. *v.* WALKER.

APPEAL FROM THE COURT OF APPEAL OF LOUISIANA, SECOND CIRCUIT.

No. 449. Decided November 16, 1964.

Appeal dismissed and certiorari denied.
Reported below: 162 So. 2d 437.

Billy R. Pesnell and *Ashton Phelps* for appellants.

W. Scott Wilkinson for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

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(f) Opinion and Judgment of the Court of Appeal, Second Circuit, State of Louisiana, on the Merits

No 10,585

COURT OF APPEAL

SECOND CIRCUIT

STATE OF LOUISIANA

EDWIN A. WALKER,

Plaintiff-Appellee,

vs.

THE ASSOCIATED PRESS AND THE TIMES-PICAYUNE PUBLISHING CORPORATION,

Defendants-Appellants.

APPEALED FROM THE FIRST JUDICIAL DISTRICT COURT IN AND FOR CADDO PARISH, STATE OF LOUISIANA

HONORABLE WILLIAM F. WOODS, JUDGE

Hargrove, Guyton, Van Hook & Ramey;
Phelps, Dunbar, Marks, Claverie & Sims;
Wells, Thomas & Wells.
Attorneys for Appellants

Wilkinson, Lewis, Woods & Carmody;
Watts, Looney, Nichols & Johnson
Attorneys for Appellee

BEFORE HARDY, GLADNEY, AYRES, *JJ.*

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By GLADNEY, *J.*

This case is on appeal from a judgment rendered in favor of Edwin A. Walker, as plaintiff, and against the Associated Press and the Times-Picayune Publishing Corporation, as defendants, in an action for libel.[1]

The plaintiff alleges the Associated Press, through its reporter, Van Savell, sent news items and releases to the Times-Picayune Publishing Corporation which contained false, malicious, defamatory and libelous statements against him that were circulated and delivered to subscribers and news agencies in Caddo Parish, throughout the state of Louisiana and other states of the United States and in foreign countries; that these articles as published in the Times-Picayune and New Orleans States-Item falsely and unfavorably reflected upon his character and reputation, charged him with unpatriotic and criminal acts in the Mississippi crisis in leading attacks against United States marshals and in inciting students to rebellion against constituted authority. Walker testified that he appeared on the campus purely as an observer and that in his speech on the campus he remonstrated with the crowd to avoid violence. Categorically, he denied he assumed command of or led the rioters at any time.

The principal defenses urged on the merits of the complaint are, first, that the alleged libelous publications were

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[1]The Associated Press is a nonprofit membership corporation, organized under the laws of the state of New York. It is engaged in gathering and distributing news to its membership, which includes newspapers and radio and television broadcasting stations throughout the United States. The Times-Picayune Publishing Corporation is the publisher of the New Orleans Times-Picayune and the New Orleans States-Item, daily newspapers of general circulation in the city of New Orleans and in the vicinity thereof. These newspapers are members of the Associated Press.

and are true in substance and in fact; and second, that the alleged publications were fair comment, were made without actual malice, and being privileged, are protected from the claim of libel by the First Amendment to the Constitution of the United States. Additionally, it is contended the trial court denied defendants a fair trial; that the court was in error in failing to sustain exceptions of improper cumulation of actions and erred in failing to sustain an attack upon Article 74 of the Louisiana Code of Civil Procedure as an unconstitutional abridgment of the rights of defendants under the First and Section 1 of the Fourteenth Amendment to the Constitution of the United States. Finally, it is argued the award of damages was greatly excessive.

The statements complained of were admittedly published by defendant's newspapers as related incidents connected with the riot which occurred September 30, 1962 on the campus of the University of Mississippi. Plaintiff is reported as leading a charge against the United States marshals and assuming command of the rioters who were responsible for the attack.

Following a series of events related to the admission of James Meredith as the first negro student of the University of Mississippi, which culminated in judgments of civil contempt rendered by the United States Court of Appeals, Fifth Circuit, against Governor Ross R. Barnett and Lieutenant Governor Paul B. Johnson of the State of Mississippi, General Walker issued statements on September 26 and September 28 over radio stations at Shreveport and New Orleans, Louisiana, calling for the support of Governor Barnett and he himself proceeded by private plane to Jackson, Mississippi, arriving there on September 29, 1962.

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While at Oxford on the evening of September 30, General Walker listened to an address by the President of the United States in which the President announced the federalization of the Mississippi National Guard in order to preserve law and order if needed. During the afternoon of that same date and after the arrival of Meredith United States marshals took positions on the campus around the Lyceum Building in which are the administrative offices of the University of Mississippi. Members of the Mississippi State Highway Patrol, under the command of Colonel Birdsong were deployed in front of the marshals. After the address of the President, General Walker and a friend, Louis Leman, proceeded by car to the University campus down University Avenue. At this time, about 8:45 P.M., people were standing on both sides of University Avenue and moving up and down the sidewalk. General Walker was recognized by a number of people standing along the street. He proceeded to a point on the sidewalk southeast of the Confederate Monument at the intersection of University Avenue with University Circle. Shortly thereafter the Mississippi State Highway Patrol began driving away around University Circle and down University Avenue. This caused an unfavorable reaction from the crowd and it was at this time plaintiff acceded to a request to speak. While speaking only for five or ten minutes he stood on the northeast side of the Monument. His audience was estimated at from 200 to 500 people. When Van Savell, the reporter of the Associated Press, arrived at the Monument, Walker was already speaking.

After the United States marshals and members of the Mississippi State Highway Patrol had deployed in front of the Lyceum Building, students returning from the week-

end gathered in the vicinity and began taunting and jeering the marshals. As the evening wore on the temper of the crowd changed and what had started as a pep rally by students became an angry hostile mob which grew until about 8 o'clock P.M. there were more than 1,000 people in the general area. The rioters were forming into groups and moving toward the marshals, throwing bricks, bottles, rocks and other missiles before being repulsed by tear gas. The bricks, stones and other missiles hurled by the rioters at the marshals were, for the most part, obtained from construction materials at the site of a new building (Hume Hall) southeast of The Circle, which was then under construction. Concrete benches inside The Circle along the sidewalks were broken up and used as missiles. Upon being repulsed by tear gas the students would return to the supply of ammunition and then turn and proceed towards the marshals. The rioting continued until about midnight when federal troops arrived and cleared the campus. At the time General Walker arrived at the campus the riot was in full progress.

The case was presented to the jury following three weeks of trial, the record of which includes the testimony of many witnesses who were in the immediate vicinity of appellee during his presence on the campus. The evidence imposed upon the jury the responsibility of deciding the truth or falsity of the alleged defamatory words and whether they were published with malice. Although the accounts given by these witnesses, particularly as to what plaintiff said in the speech and with respect to his conduct on the campus, are conflicting, the record presents substantial supporting evidence for the jury's verdict, which found to be false the published statements that General Walker took command of and led the crowd.

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The trial court in its charge to the jury correctly stated that every person has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose, and that such comments are not libelous, however severe in their terms, unless they were written maliciously. Further, the court instructed the jury that the publication of a libelous statement with respect to matters of public interest and general concern, even though the libelous statement is false, is privileged as a matter of law, unless the statement was published with malice. The court defined malice as either ill will or a reckless disregard of the truth. Illustrative of the alleged defamatory words are those found in the report set forth below.[2]

The United States Supreme Court in 1964 handed down the landmark decision of New York Times v. Sullivan, 376. U. S. 254, 11 L ed 2d 686; 84 S. Ct. 710, 95 ALR 2d 1412

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[2] "By Van Savell

Oxford, Miss., Oct. 3 (AP)—Utilizing my youth to the fullest extent, I dressed as any college student would and easily milled among several thousand rioters on the University of Mississippi campus Sunday night.

"This allowed me to follow the crowd—a few students and many outsiders—as they charged federal marshals surrounding the century-old Lyceum Building. It also brought me into direct contact with former Army Maj. Gen. Edwin A. Walker, who is now under arrest on charges of inciting insurrection and seditious conspiracy.

"Walker first appeared in the riot area at 8:45 P. M. Sunday near the University Avenue entrance about 300 yards from the Ole Miss Administration Building.

"He was nattily dressed in a black suit, tie and shoes and wore a light tan hat.

"The crowd welcomed Walker, although this was the man who commanded the 101st Airborne Battalion during the 1957 school integration riots at Little Rock, Ark. One unidentified man queried Walker as he approached the group.

'General, will you lead us to the steps?'

(1964). Its interpretation of constitutional guarantees of protection or immunity for privileged or fair comment, through application of the First and Fourteenth Amendments to the Federal Constitution, will effect substantial modification in the jurisprudence affecting the law of defamation of the several states. Necessity for this change is indicated in the following pronouncement of the decision:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."
>
> (376 U. S. 254, 279)

New York Times was a suit by a public official of Montgomery, Alabama, who alleged he had been libeled by the

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"I observed Walker as he loosened his tie and shirt and nodded 'Yes' without speaking. He then conferred with a group of about 15 persons who appeared to be the riot leaders.

"The crowd took full advantage of nearby construction work. They broke new bricks into several pieces, took survey sticks and broke soft drink bottles.

"Walker assumed command of the crowd, which I estimated at 1,000, but was delayed for several minutes when a neatly dressed, portly man of about 45 approached the group. He conferred with Walker for several minutes and then joined a group near the front.

"Two men took Walker by the arms and they headed for the Lyceum and the federal marshals. Throughout this time, I was less than six feet from Walker.

"This march toward tear gas and some 200 marshals was more effective than the previous attempts. Although Walker was unarmed, the crowd said this was the moral support they needed.

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New York Times through the advertisement of a civil rights group. Some of the statements in the advertisement claimed to be derogatory of the plaintiff were admittedly untrue and the newspaper had in its files information which showed them to be untrue. After an Alabama jury had awarded compensatory and punitive damages against the New York Times and certain individual defendants, the Supreme Court of the United States, on certiorari, reversed the Alabama judgment and held the defendants were entitled to judgment as a matter of law. The case deals with public officials only, not candidates for public office or public figures; and the alleged defamatory statements were related to the official conduct and not to the private life of the public official involved. Thus, the United States Supreme Court has laid down, as required by the constitutional guaranty of free speech and press, the rule that a statement attacking the official conduct of a public official does not forfeit the pro-

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"We were met with a heavy barrage of tear gas about 75 yards from the Lyceum steps and went a few feet further when he had to turn back.

"Before doing so, many of the rioters hurled their weapons—the bricks, the bottles, rocks and wooden stakes—toward the clustered marshals.

"We fled the tear gas and the charging marshals—the crowd racing back to a confederate soldier's statute [sic] near the Grove entrance below the Lyceum.

"I went to a telephone. A few minutes later I returned and found Walker talking with several students. Shortly thereafter, Walker climbed halfway up the Confederate Monument and addressed the crowd.

"I heard Walker say that Gov. Ross Barnett had betrayed the people of Mississippi.

'But don't let up now,' he said. 'You may lose this battle but you will have been heard.'

"He continued:

'This is a dangerous situation. You must be prepared for possible death. If you are not, go home now.'

tection of the constitutional guaranty by the falsity of *some* of its factual statements and by its alleged defamation of the public official or by a combination of these two elements, and that a defense must be allowed for erroneous statements honestly made; in other words, the court has announced a federal rule, binding on state courts, which prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice. The court has further held (footnote 30 of opinion) that since the constitutional guaranty requires recognition of the conditional privilege for honest misstatements of facts, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact, this defense also being defeasible if the public official proves actual malice. See 95 ALR 2d 1450, Anno.

"There were cheers. It was apparent that Walker had complete command over the group.

"By this time, it was nearly 11 P. M. and I raced to the telephone again. Upon my return, Walker was calmly explaining the 'new frontier' Government to several bystanders. He remained away from the rioting throughout the next few hours, but advised on several tactics.

"One Ole Miss student queried the former General, 'What can we use to make the tear gas bomb ineffective? Do you know of any way that we can attack and do some damage to those damn marshals?'

"Walker suggested the use of sand to snuff out the tear gas. 'This stuff works real well, but where can you get it?' he asked.

"At this time the rioters were using a University fire truck and five portable fire extinguishers in an attempt to make the tear gas bombs ineffective.

"I left Walker and walked about 100 yards away where Molotov Cocktails—gasoline in bottles with a fuse—were being made.

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Additional expression by the court was given to the doctrine in Garrison v. Louisiana, 379 U. S. 64; 13 L ed 2d 125, 85 S. Ct. 209; Moity v. Louisiana, 379 U. S. 201; 13 L ed 2d 339, 85 S. Ct. 323; Henry v. Collins, 380 U. S. 356; 13 L ed 2d 892, 85 S. Ct. 992; and Rosenblatt v. Baer, 383 U. S. 75; 15 L ed 2d 597, 86 S. Ct. . In each of those cases the challenged remarks were made about public officials or persons in public employment. As of this date we know of no action by the court extending the doctrine to other categories of complainants, such as public figures or people engaged in the discussion of matters of noteworthy public concern. The court, however, left open this question for future case by case determination as to who should be subject to the burden of proving "actual malice" under its standards. In Rosenblatt v. Baer, supra, through a footnote, the court made the comment:

> "We are treating here only the element of public position, since that is all that has been argued and briefed. We intimate no view whatever whether there are other bases for applying the New York

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"Again I left the area for a telephone. As I walked toward a dormitory with George Bartsch of the Little Rock Associated Press Bureau, we were attacked by marshals who mistook us for students. We were deluged by tear gas, manhandled, handcuffed and beaten with clubs during a 200-yard walk back to the Lyceum Building.

"Thanks to recognition from Chief Marshal James P. McShane, we were quickly released and given freedom in the marshals' headquarters.

"Within minutes rifle and shotgun fire erupted from the rioting crowd and two men—one a French newsman—were killed. We considered ourselves lucky to have been arrested and glad to be behind closed, heavily guarded doors."

(The New Orleans States-Item, October 3, 1962)

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Times standards—for example, that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing public concern."

(383 U. S. 75, 86)

The defense urges that the alleged libelous publications made were without malice and related to the public speech and conduct of the plaintiff, a person of admitted public prominence, who deliberately thrust himself into an area in which matters of profound significance and pressing public concern were at issue, and were protected from the claim of libel by the First Amendment to the Constitution of the United States, which the Fourteenth Amendment made applicable to the states.

The protection and immunity so claimed is a qualified or conditional privilege, the immunity gained therefrom being conditioned upon good motives and reasonable behavior. The immunity does extend to "fair" comment or criticism on matters of public interest or concern. "Public interest", however, does not confer upon a newspaper or anyone else the privilege of publishing defamation merely because it has "news value", and the public would like to read it. The privilege is limited to those matters which are of legitimate concern to the community as a whole because they materially affect the interest of all the community. The comment must be "fair" and directed and confined to the facts which are a matter of public concern, and not go beyond them by attacking the personal character of the individual involved. Prosser on Torts, 2nd Ed. pps. 606, 619 and 623.

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In a recent decision of the Supreme Court in Matassa v. Bel, 246 La. 294, 164 So. 2d 332 (1964) Chief Justice Fournet as the organ of the court made this observation:

> "In order to avail oneself of the rule of fair comment and criticism the publication must be one made 'with an honest purpose, without malice, based on facts, * * * restricted to a man's acts or works' and, in addition, it 'must not attack him in his private character nor convey imputations of an evil sort except so far as the facts, truly stated, warrant the imputation.' And for the publication to enjoy a qualified privilege, the statement must be prepared bona fide, with the view to preventing or punishing some public abuse, in which case it is considered as justified as a duty owed to society, providing it does not 'meet the objection of having been made maliciously and without probable cause.' Madison v. Bolton, 234 La. 997, 102 So. 2d 433, and the extensive authorities therein cited.
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> "As was very aptly observed in that case, 'while the great weight of authority supports the view that publications concerning political matters, public officers, and candidates for office are entitled to a measurable privilege by reason of the public interest involved, there are recognized limitations on the rule, foremost among these being that the statements must not be motivated by actual malice,' and, further, that 'persons holding or aspiring to public office are not wholly without the protection of the law, since it is generally held that accusations of dishonesty or corruption and imputations of dereliction of duty or misconduct in office are not privileged.'"
>
> (164 So. 2d 332, 334)

A similar observation is found in Kennedy v. Item Company, 213 La. 347, 34 So. 2d 886 (1948):

> "But in securing to themselves this unqualified right, they never intended to place those exercising it wholly beyond the reach of the law and unaccountable for the abuse of the privilege. As was so aptly pointed out by Justice Kent of New York in the celebrated case of People v. Croswell, 3 Johns. Cas. 337, at page 393, decided in 1804, 'The founders of our governments were too wise and too just, ever to have intended, by the freedom of the press, a right to circulate falsehood as well as truth, or that the press should be the lawful vehicle of malicious defamation, or an engine for evil and designing men, to cherish, for mischievous purposes, sedition, irreligion, and impurity. Such an abuse of the press would be incompatible with the existence and good order of civil society.' In this same opinion the organ of the court accepted as correct and accurate General Alexander Hamilton's definition 'that liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals.' * * *"
>
> (34 So. 2d 886, 889)

As stated by William H. Taft, J., later President and Chief Justice of the United States Supreme Court, in a leading case, Post Publishing Company v. Hallam, 59 F. 530 (C. C. A. 6th, 1893):

> "* * * The existence and extent of privilege in communications are determined by balancing the

needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed. Where conditional privilege is extended to cover a statement of disgraceful fact to a master concerning a servant or one applying for service, the privilege covers a bona fide statement, on reasonable ground, to the master only, and the injury done to the servant's reputation is with the master only. This is the extent of the sacrifice which the rule compels the servant to suffer in what was thought to be, when the rule became law, a most important interest of society. But if the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with a single person or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable ground. We think that not only is such a sacrifice not required of everyone who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good. We are aware that public officers and candidates for public office are often corrupt, when it is impossible to make legal proof thereof, and of course it would be well if the public could be given to know, in such a case, what lies hidden by concealment and perjury from judicial investigation. But the danger that honorable and worthy

men may be driven from politics and public service by allowing too great latitude in attacks upon their characters outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact, but are incapable of legal proof. * * *"

(59 Fed. 530, 540)

The jurisprudence of this state and in a majority of jurisdictions, has consistently adhered to the rule that fair comment on and criticisms of the acts and conduct of a public officer or candidate for public office are, in the absence of malice, privileged, but the rule does not apply to a false statement of fact. In these jurisdictions defamatory statement of fact concerning one in public life, or who is a candidate for office, if false, is as actionable as would be such a statement concerning one in private life.[3] As further reflected in our jurisprudence, in actions for defamation, the courts have indulged in a prima facie presumption that defamations which are actionable, per se, are malicious. In New York Times, however, it was held that a presumption of malice where general damages in a libel action are concerned is inconsistent with the constitutional guarantee of freedom of press, which affords the defendant a qualified privilege of honest mistake.

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[3] [3]Levert v. Daily States Pub. Co., 123 La. 594, 49 So. 206, (1909), 23 L. R. A. (N. S.) 726, 131 Am. St. Rep. 356; Smith v. Lyons, 142 La. 975, 77 So. 896 (1917), L. R. A. 1918E, 1; Otero v. Ewing, 162 La. 453, 110 So. 648 (1926), 56 A. L. R. 249 (later appeal in (1927), 165 La. 398, 115 So. 633); Edwards v. Derrick, 193 La. 331, 190 So. 571 (1939); Cadro v. Plaquemines Gazette, 202 La. 1, 11 So. 2d 10 (1942); Martin v. Markley, 202 La. 291, 11 So. 2d 593 (1942).

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Notwithstanding the criteria imposed by New York Times and its impact upon our jurisprudence, it was not the intent of the court to recognize absolute immunity from libelous statements. Thus Garrison v. Louisiana, supra, recognized the exception, declaring:

> "The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. Cf. Riesman, Democracy and Defamation: Fair Game and Fair Comment, I, 42 Col L Rev 1085, 1088-1111 (1942). That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality * * *' Chaplinsky v. New Hampshire, 315 US 568, 572, 86 L ed 1031, 1035,

62 S. Ct. 766. Hence the knowingly false statement and false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

(379 US 64, 13 L ed 2d 125, 133)

Resolution of the instant case does not depend upon certain federal and state courts which have extended the New York Times rule to those persons other than public officials or persons in public employment, who thrust themselves "into the vortex of the discussion of a question of pressing public concern."[4] It is our position that plaintiff furnished satisfactory proof to the jury and to this court that the libelous statements were "made with 'actual malice', * * * that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

Counsel for appellee assert that the alleged libelous statements in the instant case were deliberately made by Van Savell in reporting that Walker committed crimes in assuming command of the mob and leading charges against United States Marshals; and that they were made with knowledge of their falsity or with reckless disregard of the truth.

It is significant that the words complained of related to actions and conduct which were represented as positive statements of fact personally observed. As so reported there can be no real basis for mistake or error honestly made

[4]Some of the federal and state courts have extended the principle of New York Times to private individuals involved in public controversy, others have not done so. The factual situation in each individual case has an important bearing on the application of the rule. See discussion of authorities in Linus Pauling v. Globe-Democrat Publishing Company, 362 Fed. 2d 188 (1966).

therein. The statements were either false or true and knowingly represented as such. Forasmuch as falsity has been proven to the jury and to this court, we are impelled to the conclusion that the representations were made with knowledge of their falsity or with reckless disregard for the truth. We therefore find that the words were libelous, per se, and made with actual malice.

Appellants complain that the trial of the case denied to them due process of law, the right to a fair and impartial trial, and the protection of the Fourteenth Amendment to the United States Constitution, urging objection, first, that the remarks of plaintiff's counsel to the jury were improper and prejudicial, and second, that although appellants requested a special charge that punitive damages were not recoverable in Louisiana, the court nonetheless refused to give such instructions. The record discloses the trial judge gave the following instructions to the jury:

> "You are to disregard any remarks of counsel which you find to be inconsistent with the evidence in the case or the law as charged you by the Court.
>
> "The general law is that the reparation should be equal to the injury received, and that no one should be allowed to unjustly enrich himself at the expense of another.
>
> * * * * *
>
> "If you should find that the plaintiff is entitled to a verdict in this case, you should allow such sums as will fairly and reasonably, in your best judgment, based on the evidence in the case, compensate him for the damages sustained; but only for items claimed in the petition and not to exceed the amounts as claimed * * *."

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In the presentation of the plaintiff's case to the jury, it is charged that his counsel demanded damages of $1,000 for each of the 1250 newspapers members of the Associated Press and that he further made inflammatory remarks, such as "These people need a lesson. You have got to teach them" and appealed to racial prejudice. Examination of the purported remarks to the jury in view of the charges given by the district judge, do not appear to us to be unduly prejudicial. However, appellants' contentions are without merit as this court is one in which the appeals are upon both the law and the facts. Article 7 § 28 Louisiana Constitution, 1921. We may and do correct any such irregularity. The contention relating to punitive damages is likewise untenable by reason of proper instructions by the court and this court's Constitutional powers.

Further error is assigned to the district court's failure to sustain exceptions of improper cumulation of actions. The error is predicated upon the argument that:

> "* * * plaintiff's demand includes claims or causes of action based on conduct, communications or publications alleged to have occurred and occurring outside of Caddo Parish, Louisiana, and for the recovery of damage alleged to have been sustained by the plaintiff outside of Caddo Parish, Louisiana, as to which the First Judicial District Court in and for Caddo Parish, Louisiana, is not a court of proper venue."

The exact issue has not been heretofore presented to this court, except as to some aspects of this question discussed in our previous decision in this case which determined the issue of venue. (162 So. 2d 437). Appellants' contention is based upon the proposition that there are multiple causes of action as opposed to a single cause of action with each

court of separate jurisdiction having venue of the action for recovery of damage occurring within the court's jurisdiction. Under the single publication rule, there is but one cause of action occurring at the time of the first communication of libel and venue is proper only as to the location of the printing and beginning of distribution, the libel being complete at that point. Further circulation of the printed material containing the libel becomes a further incident as to the same libel or the same cause of action. Under our venue statute, C. C. P. Art. 74, as so interpreted in our prior decision, 162 So. 2d 437, supra, venue is proper in any parish where the libel was circulated, due to an incident of wrongful conduct having occurred therein. When the issue of venue was passed upon by this court we ruled that once venue is established, the jurisdiction of the court extends to all damages caused by the wrongful conduct, even if such damages occurred in multiple instances and beyond the territorial jurisdiction of the court of proper venue. Although counsel for appellants refer to a comment appearing in 25 La. Law Review at page 435 and 436[5] as supporting their argument, such comment merely seems to approve of the multiple action rule. We prefer to hold there is but a single action which means that only a part of the wrong-

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[5] "The appellate court upheld the venue as to the Associated Press on the ground that 'An action against joint or solidary obligors may be brought in any parish where such action may be maintained against either.' 162 So. 2d at 440. This is much too broadly stated. The pertinent code provision reads: 'An action against joint or solidary obligors may be brought in any parish of proper venue, under article 42, as to any obligor who is made a defendant.' La. Code of Civil Procedure art. 73 (1960). However, this is of no moment here, as the venue was proper as to Associated since the damages caused by its wrongful act were sustained in Caddo Parish. * * *."

ful conduct has to occur within the court's jurisdiction in order to give it complete venue.

The Times-Picayune in further support of its argument on the exception of improper cumulation of actions, asserts that plaintiff is suing upon a separate cause of action against each of the defendants and that they are not solidarily liable and therefore they are not joint tort feasors. Cited as authority is the case of McGee v. Collins, 166 La. 291, 100 So. 430 (1924). This case is not authority for defendants' postulation. Questions of slander were involved therein and not libel, the court pointing out that the publication of a libel may be the joint act of two or more persons who may in such case be sued jointly or separately at the election of the plaintiff, whereas such is not true with respect to an action for slanderous words for the reason that the words of one person are not the words of others.

An additional assignment of error attacks the constitutionality of L S A-C. C. P. Art. 74 as applied in the trial court in this case as an unconstitutional abridgment of the rights of the defendants under the First and Fourteenth Amendments to the Constitution of the United States. It is argued that in its application herein Article 74, which provides that an action for the recovery of damages for an offense or quasi offense, may be brought in the parish where the wrongful conduct occurred, or in the parish where the damages were sustained, has a direct tendency to restrict or inhibit the dissemination and circulation of news information and intelligence, and that it gives a plaintiff in an action for an alleged libel the right to select as a forum for his suit any of the sixty-four parishes within the state to which the alleged libelous material may have been sent or received. It is further argued that such venue statutes have been held unconstitutional by courts of other

states, that minimal circulation may be used to set venue, and that the codal article is discriminatory in that other tort feasors would not have the same privileges of multiple venues. This issue of unconstitutionality was presented to the Supreme Court of Louisiana and the Supreme Court of the United States. Upon the issue of venue, following our decision, writs of certiorari were requested of the Supreme Court of this state which were denied, 246 La. 374, 164 So. 2d 360 (1964) and thereafter an appeal was made to the Supreme Court of the United States. That court treated appellants' application as one of certiorari and granted a motion to dismiss for want of jurisdiction. 379 U. S. 47, 13 L ed 2d 183, Reh. den., 379 U. S. 984, 13 L ed 2d 577.* Applicable to the instant case, we think, is

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* Appellants presented therein the following questions:
"(1) Whether Article 74 of the Louisiana Code of Civil Procedure, as interpreted, construed and applied by the Court of Appeal, Second Circuit, State of Louisiana, constitutes an unwarranted interference with Appellants' rights of free speech and freedom of the press and imposes an undue and unnecessary burden on Appellants in the exercise of their rights of free speech and freedom of the press under the First and Fourteenth Amendments to the Constitution of the United States?

"(2) Whether Article 74 of the Louisiana Code of Civil Procedure, as interpreted, construed and applied by the Court of Appeal, Second Circuit, State of Louisiana, deprives Appellants of their rights to equal protection of the law and due process of law under Section 1 of the Fourteenth Amendment to the Constitution of the United States by:

"(a) Giving a plaintiff seeking damages for libel in a case of this type privileges of venue not allowed by law to a plaintiff in actions for the recovery of damages for torts generally and subjecting Appellants to more onerous venue provisions than are applied to other defendants in tort actions generally;

and

"(b) Subjecting Appellants to a multiplicity of actions for for what is practically and essentially a single alleged tort?"

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C. C. P. Art. 463, which provides that parties plaintiff or defendant may be joined in the same suit if there is a community of interest between the parties joined and all of the actions cumulated are mutually consistent and employ the same form of procedure. These conditions are met in the present case. The defendants are clearly joint tort feasors and in our opinion the actions against each have been properly cumulated.

The defendant Times-Picayune relies on the case of Layne v. Tribune Company, 108 Fla. 177, 146 So. 234 (1933) for the principle that only nominal damages should be assessed against a publisher who relies on a responsible and reliable news agency and publishes such accounts without malice. It is conceded by the defendant that this rule has never been accepted by the courts of Louisiana, but it is argued that our courts have awarded damages against publishers only in nominal amounts and accordingly have adopted the spirit of the Layne case. As supporting the decision reference is made to Barnhill v. Times-Picayune. 171 La. 286, 131 So. 21 (1930). That case involved a report indicating that the plaintiff had mistreated his wife in which the AP dispatch gave the incorrect name. The case turned upon the finding that plaintiff was not injured and he was awarded only $25.00. The court, however, made the following interesting comment:

> "Necessarily, a publisher of a newspaper must collect news items through reporters and other agents. If a publisher is not held responsible for the fault or negligence of such agents in gathering news and sending in to the papers libelous reports, then recovery of damages in such cases could not be had,

and the law of libel would become a dead letter in this state."

(131 So. 21, 23)

As heretofore noted, the Associated Press is a member corporation of which the Times-Picayune is a member. Its by-laws describe it as:

> "* * * a mutual and cooperative association formed to gather with economy and efficiency an accurate and impartial report of the news * * * and to furnish and supply the same to its members * * *."

It would thus seem clear to us that either a relationship of agency between the association and its members had been formed or that the principle of respondeat superior must be followed as provided in LSA-C. C. Art. 2320. It is admitted that Savell was in the employ of the Associated Press, an association which the Times-Picayune Publishing Corporation voluntarily joined, financially supported, and from which it profited by the labors of that association. As a member, a profiting member of the association, it should respond for the torts of the employees of the association.

The judgment of the trial court, responsive to the jury verdict, fixed damages in the sum of $2,250,000. Defendants contend, and rightly so we think, that this amount is excessive and should be revised. It must be recognized, of course, that punitive damages cannot be recovered in civil actions in Louisiana, including civil actions for libel. Petitioner's claim embraces actual or special damages of loss of future earning capacity of $250,000; other items comprehend damages to plaintiff's good name, fame and reputation of $1,000,000; damages resulting from mortification

and humiliation in the amount of $500,000, and mental pain and anguish, $500,000. Except for the actual or special damages as above claimed, the other items fall within the class referred to as general damages. Petitioner has failed to prove actual or special damages as such. As a rule, where a publication is libelous, per se, charging as it does, acts which would constitute criminal offenses, such charges are considered as justifying an inferential conclusion of damages subject to monetary compensation without the necessity for special proof. On the other hand, actual or special damages must be supported by factual proof. The Supreme Court, in its determination of quantum in the case of Kennedy v. Item Company, 213 La. 347, 34 So. 2d 886, made this comment which we find apropos:

> "* * * in fixing an amount we must, under the jurisprudence, take into consideration the severity of the charges, the motives of the publisher, as well as the position of influence enjoyed by the newspaper and the extent of its circulation. We must also take into consideration the fact that the plaintiff, in seeking vindication by peaceful and orderly means, has had to bear with his injured feelings during this long and protracted litigation * * * as well as the time, efforts, and expense expended by him in connection therewith. Besides, although it is as a practical matter almost an impossibility to envision the actual, both present and future, effect this editorial will have on the plaintiff's business and profession, we must consider this in our arrival at the proper amount of damages to award him, for it is well known that such matters have an uncanny way of coming to light through one medium or another and

confronting the victim in the future whenever he is being considered, whether in a business venture or in a matter of public or private importance. * * *"

"While it is true, as pointed out by the defendant, that nominal damages only are given in many cases, in these cases the court found that the publication was made in good faith, with good motives, for justifiable ends, and with no malice or ill will toward the victim. Where these things have not been found to be true, the awards have been much more than mere nominal damages. * * *"

(34 So. 2d 886, 895)

Counsel for the defendants has furnished a table of awards of damages in Louisiana defamation cases which reflect awards involving comparatively modest sums, varying from $1.00 to $9,500.00. To offset the implications therefrom, counsel for plaintiff have made reference to a number of cases from other jurisdictions reflecting awards of damages varying in amounts from $100,000 to $500,000. It does not seem to us that a review or discussion of those decisions will be helpful.

The background of the plaintiff, his achievements and success in life have already been recorded as has been the severity of the defamation. The circumstances require that the award be substantial. After weighing this matter and excluding from our findings punitive or exemplary damages as such, we fix the award in this case at the sum of Seventy-Five Thousand and No/100 Dollars ($75,000.00) with five per cent (5%) per annum interest from the tenth (10th) day of September, 1963, until paid.

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Accordingly, the judgment of the trial court is amended by reducing the award in favor of plaintiff from $2,250,000.00 to the sum above fixed, and as so amended, the judgment is affirmed.

Appellants are taxed with the costs of this appeal.

Appendix B

(g) Memorandum Decree of the Supreme Court of Louisiana on the Merits

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

No. 48,509

February 3, 1967

EDWIN A. WALKER

v.

THE ASSOCIATED PRESS

AND

THE TIMES-PICAYUNE PUBLISHING CORPORATION

In re: The Associated Press applying for certiorari, or writ of review, to the Court of Appeal, Second Circuit, Parish of Caddo. 191 So. 2d 727.

Writ refused. On the facts found by the Court of Appeal, we find no error of law in its judgment.

/s/ EHMcC
/s/ JBF
/s/ JBH
/s/ WBH
/s/ JWS
/s/ FWS

HAWTHORNE, *J.*, is of the view that the application should be granted for a consideration of assignment of error number ten (10)—that is whether Art. 74 of the Code of Civil Procedure is constitutional as applied in this case.

APPENDIX C

Portions of Record Raising Constitutional Questions Below

(a). Special Plea of Unconstitutionality (R. 67-68)

No. 160,536

FIRST JUDICIAL DISTRICT COURT

CADDO PARISH, LOUISIANA

EDWIN A. WALKER

vs.

THE ASSOCIATED PRESS *et al.*

SPECIAL PLEA OF UNCONSTITUTIONALITY

NOW INTO COURT, through undersigned counsel, comes THE ASSOCIATED PRESS, made defendant in the above numbered and entitled cause, appearing herein solely for the purpose of urging this special plea, and with respect shows that:

1

Article 74 of the Louisiana Code of Civil Procedure, which was enacted into law by the Louisiana Legislature as a part of Act 15 of 1960, effective January 1, 1961, provides that:

"An action for the recovery of damages for an offense or quasi offense may be brought in the parish where the wrongful conduct occurred, or in the parish where the damages were sustained."

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2

If, as applied to an action based on libel and, in particular, to the above numbered and entitled cause, Article 74 of the Louisiana Code of Civil Procedure is construed so as to authorize or permit a plaintiff in such an action to file a suit in any parish in which a newspaper printing the alleged libelous article is circulated and/or in any parish in which an alleged defamatory statement is received by radio or television from a broadcast emanating from or originating in another parish, then defendant, The Associated Press, shows that Article 74 of the Louisiana Code of Civil Procedure as so construed and interpreted is an unconstiutional abridgment of its rights under Article 1, Section 2, of the Constitution of Louisiana, and Section 1 of the Fourteenth Amendment of the Constitution of the United States for the reason that such a construction and interpretation of Article 74 of the Louisiana Code of Civil Procedure would give a plaintiff seeking damages for libel privileges of venue not allowed by law to a plaintiff in actions for the recovery of damages for an offense or quasi offense other than libel, in which the cause of action could accrue in only one parish and in which the resulting damage could be sustained in only one parish.

WHEREFORE, defendant, The Associated Press, prays that, if Article 74 of the Louisiana Code of Civil Procedure is construed and interpreted so as to permit a plaintiff in a libel action, particularly in the above numbered and entitled cause, to file a suit in any parish in which a newspaper printing the alleged libelous article is circulated and/or in any parish in which an alleged defamatory statement is received by radio or television from a broadcast emanat-

ing from or originating in another parish, then and in that event that Article 74 of the Louisiana Code of Civil Procedure as so construed and interpreted be adjudged an unconstitutional abridgment of defendant's rights under Article 1, Section 2, of the Constitution of Louisiana, and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

HARGROVE, GUYTON, VAN HOOK and RAMEY

By /s/ JOHN T. GUYTON
John T. Guyton
Attorneys for The Associated Press
867 Texas Eastern Building
Shreveport, Louisiana

Appendix C

(b) Excerpt From the Application for Rehearing in the Court of Appeal, Second Circuit, State of Louisiana, on Exception of Improper Venue (R. 121)

5

Article 74 of the Louisiana Code of Civil Procedure, as interpreted, construed and applied by this Court in this case, is an unconstituional abridgment of Respondents' rights under Article 1, Section 2, of the Constitution of Louisiana, and the First and Fourteenth Amendments of the Constitution of the United States in that it:

(a) Gives a plaintiff seeking damages for libel in a case of this type privileges of venue not allowed by law to a plaintiff in actions for the recovery of damages for an offense or quasi offense generally, subjects Respondents to more onerous venue provisions than are applied to other litigants charged with an offense or quasi offense generally and thereby deprives Respondents of equal protection and due process of the law;

and

(b) Constitutes an unwarranted interference with Respondents' rights of free speech and freedom of the press and imposes an undue and unnecessary burden on Respondents in the exercise of their rights of free speech and freedom of the press and deprives Respondents of due process of law by subjecting Respondents to a multiplicity of actions for what is practically and essentially a single alleged wrong, and by allowing a plaintiff in a case of this type an essentially arbitrary and fundamentally unfair choice of forum for litigation.

Appendix C

(c) Notice of Appeal to the United States Supreme Court on Exception of Improper Venue (R. 126-129)

No. 160,536

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

EDWIN A. WALKER,

Plaintiff,

vs.

THE ASSOCIATED PRESS *et al.*

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I

Notice is hereby given that THE ASSOCIATED PRESS and THE TIMES-PICAYUNE PUBLISHING CORPORATION, defendants in the above numbered and entitled cause, hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeal, Second Circuit, State of Louisiana, entered in this action on February 13, 1964, reversing the judgment of the First Judicial District Court in and for Caddo Parish, Louisiana, which sustained Exceptions of Improper Venue filed by The Associated Press and The Times-Picayune Publishing Corporation and which ordered this action transferred to the Civil District Court in and for the Parish of Orleans, State of Louisiana, for further proceedings, and rejecting the pleas of The Associated Press and The Times-Picayune Publishing Corporation that Article 74 of the Louisiana Code of Civil Procedure, as so interpreted, construed and applied in this case was an unconstitutional abridgment of their rights

under the First and Fourteenth Amendments of the Constitution of the United States. By order dated April 13, 1964, the Court of Appeal, Second Circuit, State of Louisiana, refused the timely application of The Associated Press and The Times-Picayune Publishing Corporation for a rehearing. The Supreme Court of Louisiana subsequently refused the application of The Associated Press and The Times-Picayune Publishing Corporation for Writs of Certiorari, Prohibition and Mandamus and, alternatively, Writs of Certiorari and Review, by order entered in this action on June 8, 1964.

This appeal is taken pursuant to the provisions of 28 U. S. C. A., § 1257 (2).

II

The Clerk of the First Judicial District Court in and for Caddo Parish, Louisiana, will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(1) The petition of the plaintiff filed herein on September 10, 1963, together with the exhibits annexed thereto;

(2) The petition of The Associated Press for the removal of this action to the United States District Court in and for the Western District of Louisiana, Shreveport Division, filed herein on September 27, 1963;

(3) The order of the United States District Court in and for the Western District of Louisiana, Shreveport Division, remanding this action to the First

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Judicial District Court in and for Caddo Parish, Louisiana, dated November 8, 1963;

(4) Declinatory Exception of Improper Venue and Dilatory Exceptions of Improper Cumulation of Actions, Misjoinder of Parties Defendant and Vagueness or Ambiguity of Petition filed by both defendants, The Associated Press and The Times-Picayune Publishing Corporation;

(5) Special Pleas of Unconstitutionality filed by both defendants, The Associated Press and The Times-Picayune Publishing Corporation;

(6) The opinion of the First Judicial District Court in and for Caddo Parish, Louisiana, sustaining defendants' Exceptions of Improper Venue, dated December 11, 1963;

(7) The judgment of the First Judicial District Court in and for Caddo Parish, Louisiana, sustaining defendants' Exceptions of Improper Venue and ordering this action transferred to the Civil District Court in and for the Parish of Orleans, Louisiana, dated December 17, 1963;

(8) The opinion and judgment of the Court of Appeal, Second Circuit, State of Louisiana, entered in this action on February 13, 1964;

(9) The Application for Rehearing filed by defendants, The Associated Press and The Time-Picayune Publishing Corporation, in this action in the Court of Appeal, Second Circuit, State of Louisiana, on February 27, 1964;

(10) The order of the Court of Appeal, Second Circuit, State of Louisiana, dated April 13, 1964, refusing the application of defendants, The Associated Press and The Times-Picayune Publishing Corporation, for a rehearing;

(11) Notice of the intention of defendants, The Associated Press and The Times-Picayune Publishing Corporation, to apply to the Supreme Court of Louisiana for writs;

(12) The application of defendants, The Associated Press and The Times-Picayune Publishing Corporation, to the Supreme Court of Louisiana for Writs of Certiorari, Prohibition and Mandamus and, alternatively, for Writs of Certiorari and Review filed on May 12, 1964;

(13) The order of the Supreme Court of Louisiana entered in this action on June 8, 1964, refusing the application of defendants, The Associated Press and The Times-Picayune Publishing Corporation, for writs; and

(14) This notice of appeal.

III

The following questions are presented by this appeal:

This action was brought by Major General Edwin A. Walker, a resident of the State of Texas, in the First Judicial District Court in and for Caddo Parish, Louisiana, to recover the sum of Three Million Dollars ($3,000,000.00), as damages, based on alleged defamatory news reports allegedly published by defendants and circulated by newspaper, radio and television broadcasting media through-

out Louisiana, the United States and the rest of the world in connection with the admission of James H. Meredith, a Negro, to the University of Mississippi. The Associated Press, a New York corporation, and The Times-Picayune Publishing Corporation, a Louisiana corporation domiciled in Orleans Parish, Louisiana, were named as defendants. The only office or place of business which either defendant has in the State of Louisiana is located in Orleans Parish. Article 74 of the Louisiana Code of Civil Procedure provides, in pertinent part, that:

> "An action for the recovery of damages for an offense or quasi offense may be brought in the parish where the wrongful conduct occurred, or in the parish where the damages were sustained."

As interpreted, construed and applied in this case by the Court of Appeal, Second Circuit, State of Louisiana, Article 74 gives a non-resident plaintiff the right to select as a forum for his action any one of the sixty-four (64) parishes in the State of Louisiana to which any copy of the newspaper carrying the alleged defamatory news report may have been sent or received and there have his case tried by jury and to ignore, if he chooses, the parish where the alleged defamatory news reports were first placed into circulation. The questions presented under these circumstances are:

(1) Whether Article 74 of the Louisiana Code of Civil Procedure, as interpreted, construed and applied by the Court of Appeal, Second Circuit, State of Louisiana, deprives defendants of their rights to equal protection of the law and due process of law under Section 1 of the Fourteenth Amendment to the Constitution of the United States by:

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(a) Giving a plaintiff seeking damages for libel in a case of this type privileges of venue not allowed by law to a plaintiff in actions for the recovery of damages for an offense or quasi offense generally and subjecting defendants to more onerous venue provisions than are applied to other defendants charged with an offense or quasi offense generally;

and

(b) Subjecting defendants to a multiplicity of actions for what is practically and essentially a single alleged wrong.

(2) Whether Article 74 of the Louisiana Code of Civil Procedure, as interpreted, construed and applied by the Court of Appeal, Second Circuit, State of Louisiana, constitutes an unwarranted interference with defendants' rights of free speech and freedom of the press and imposes an undue and unnecessary burden on defendants in the exercise of their rights of free speech and freedom of the press under the First and Fourteenth Amendments to the Constitution of the United States?

HARGROVE, GUYTON, VAN HOOK AND RAMEY

By /s/ JOHN T. GUYTON
John T. Guyton

By /s/ BILLY R. PESNELL
Billy R. Pesnell

867 Texas Eastern Building,
Shreveport, Louisiana.

Attorneys for The Associated Press.

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(d) Excerpt From the Petition to the Supreme Court of Louisiana for Writ of Certiorari or Review on Exception of Improper Venue (R. 163-167)

ASSIGNMENT OF ERROR NO. 2

(2) The Court of Appeal erred in failing to hold that Article 74 of the Louisiana Code of Civil Procedure, as interpreted, construed and applied by it in this case is an unconstitutional abridgment of petitioners' rights under Article 1, Section 2, of the Constitution of Louisiana and the First and Fourteenth Amendments of the Constitution of the United States, since it:

(a) Gives a plaintiff seeking damages for libel in a case of this type privileges of venue not allowed by law to a plaintiff in actions for the recovery of damages for an offense or a quasi offense generally and subjects petitioners to more onerous venue provisions than are applied to other litigants charged with an offense or a quasi offense generally and thereby deprives petitioners of equal protection and due process of law; and

(b) Constitutes an unwarranted interference with petitioners' rights of free speech and freedom of the press and imposes an undue and unnecessary burden on petitioners in the exercise of their rights of free speech and freedom of the press, and deprives petitioners of due process of law by subjecting petitioners to a multiplicity of actions for what is practically and essentially a single wrong, and by allowing plaintiff in a case of this type an essentially arbitrary and fundamentally unfair choice of forum for litigation.

Appendix C

As interpreted and applied by the Court of Appeal in this case, Article 74 gives a plaintiff seeking damages for libel in a case of this type privileges of venue not allowed by law to a plaintiff in actions for the recovery of damages for an offense or quasi offense other than libel. It subjects petitioners to more onerous venue provisions than any other litigant generally charged with an offense or quasi offense, other than libel, and deprives petitioners of equal protection of the law. As the Missouri Supreme Court held in Litzinger v. Pulitzer Publishing Company, 356 S. W. 2d 81 (Mo. 1962):

> "... a statute that would allow one to sue a publishing corporation for libel in any county he chose where the allegedly libelous publications were circulated would be unconstitutional as depriving persons sustaining injuries for tortious acts other than libel of equal protection of the law and of their property without due process of law." *Litzinger v. Pulitzer Publishing Company,* supra, at p. 84.

Article 74, as interpreted, construed and applied by the Court of Appeal in this suit, constitutes an unwarranted interference with the right of freedom of the press; it imposes an undue and unnecessary burden on petitioners in the exercise of their right of freedom of the press by subjecting petitioners, as it does, to a multiplicity of actions for what is essentially and practically a single alleged wrong. Under Article 74, as interpreted here, the door is now open for a vindictive plaintiff, or one seeking a bargaining position for purposes of extortion, to subject a defendant to numerous suits throughout the State. Moreover, Article 74, as interpreted, construed and applied by the Court of

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Appeal here, allows a plaintiff in a case such as this a fundamentally unfair choice of forum for litigation—a point which has been judicially recognized on many occasions. Thus, in *Age-Herald Pub. Co. v. Huddleston*, 207 Ala. 40, 92 So. 193 (1921), the Court said:

> "We do not see how there can be any conflict of opinion as to the unfairness, injustice, or impolicy of permitting aggrieved persons, in this class of cases only, to select at their pleasure any judicial forum within the state where the political, religious, industrial, moral, or personal predilections of the local citizenship may readily furnish a jury whose biased views will probably be reflected, however sincerely, in a verdict favorable to them." *Age-Herald Pub. Co. v. Huddleston*, supra, at pp. 197-198.

Similarly, Judge Graves wrote in *Julian* v. *Kansas City Star Co.*, 239 Mo. 35, 107 S. W. 496 (1907), that:

> "It is broadly contended that under section 997 a plaintiff in this one class of cases has the right to select the forum of his trial and locate it in either of the 114 counties of the state, provided copies of the paper reach all of them; that he can leave the county of his residence, which is likewise the residence of the defendant, and where the first publication is made, and pick from the 114 counties one where the citizenship is such that to his mind indicates practical results in his suit. If such plaintiff be a Democrat, and is suing a paper of the Republican faith, he claims the right under this statute to go into a Democratic county, where perhaps the paper,

on account of political views, is in bad odor, and there have a trial of the issue. If plaintiff be a Republican, and is suing a Democratic paper, under this contention he claims the right to lodge his complaint in the strongest Republican county of the state, where perhaps that paper, for political reasons, is in bad odor, and there, with those surroundings, have the measure of his damages bountifully meted out to him. So, also, if he be a brewer, and had been, in his judgment, defamed by some paper advocating the cause of temperance, or religion, he would claim the right to go to the 'wettest' county of the state, and there, surrounded by his friends and sympathizers, have justice meted out to him, and all in the name of the law. Vice versa, as to the forum and surroundings, were the plaintiff a believer in the cause of prohibition and the offender an organ published in the interest of the liquor business. And all this in the name of the law, which detests everything unreasonable, unjust and unfair! And all this where no other class of suitors can claim such right, and in the name of equal protection and equal rights under the law! . . ." *Julian v. Kansas City Star Co.*, supra, at p. 509.

These same views were expressed by Chief Justice Fly in *Hennessey v. Campbell*, 32 S. W. 2d 390 (Tex. Civ. App. 1930), as follows:

"The present law as to venue of libel cases was enacted to meet the wrong inflicted upon defendants, especially newspapers and periodicals, by the former statute in permitting suits in such cases to be prose-

> cuted in any county in which the libel was published, that is, made known. It often became very oppressive in requiring parties to answer in counties far remote from their domiciles and in a community selected by the plaintiff, known to be adverse to the defendant in such cases." *Hennessey v. Campbell*, supra, at p. 391.

We submit that Article 74, as interpreted, construed and applied by the Court of Appeal in this case, violates petitioners' constitutional rights.

Of course, a statute should not be construed to sanction unjust and unreasonable results in the first place. *State* v. *Randall*, 219 La. 578, 53 So. 2d 689 (1951). And, it is the plain duty of the Court to interpret and apply a statute so as not to cast a doubt on its constitutionality. *Conley v. City of Shreveport*, 216 La. 78, 43 So. 2d 223 (1950); *Lewis v. State*, 207 La. 194, 20 So. 2d 917 (1945); *State v. Gatlin*, 241 La. 321, 129 So. 2d 4 (1961). The Court of Appeal could have easily avoided the constitutional question in this case by a proper interpretation and application of Article 74, as petitioners have already pointed out. But, it erroneously neglected to do so. Unless corrected by this Court, Article 74, as interpreted, construed and applied by the Court of Appeal in this case, violates petitioners' constitutional rights, and is nullified by the constitutional limitations referred to hereinabove.

Summary of Argument

In summary, Article 74 is an exception to the general rules of venue prescribed by Article 42. The law is clear that exceptions to the general rules of venue must be strictly

construed and that one who claims the benefit of an exception to the general rules of venue must clearly bring himself within the exception. Plaintiff has clearly failed to bring himself within the exception provided by Article 74. His claim for damages is not limited to the publication of the alleged defamatory reports in Louisiana; it includes publications alleged to have been made throughout the United States and throughout the world which clearly constitute separate and distinct causes of action under the applicable law. Manifestly, Article 74 cannot be applied extra-territorially.

Under Louisiana law, the publication of a defamatory statement in any one edition of a newspaper or magazine or through any one radio or television broadcast, regardless of the number of copies of the newspaper circulated, or the number of listeners or recipients of the defamatory statement, is but one publication and gives rise to but one cause of action. Since the libel is accomplished and the cause of action completed when the publication first goes into circulation (*Brian v. Harper*, supra), the place where the libel is first placed into circulation is also the place where the cause of action arises. Both elements of the cause of action, namely, wrongful conduct and damage, concur in point of time at the place where the publication first goes into circulation. Thereafter, the geographic distribution and circulation of the libel is relevant only as an evidentiary matter on the quantum of damages. Plaintiff does not allege in his petition that any of the defamatory statements allegedly published by petitioners were first placed into circulation in Caddo Parish.

Plaintiff is not a resident of the State of Louisiana. Petitioner The Times-Picayune Publishing Corporation is a Louisiana corporation with its registered corporate office

and principal place of business located in Orleans Parish. Petitioner The Associated Press has its only office and place of business in the State of Louisiana in Orleans Parish. Heretofore, no Louisiana court has ever allowed a resident of this state the right of venue claimed here by plaintiff. In view of the constitutional limitations and applicable law involved, certainly there is no reason to believe that such a right would be allowed to a non-resident. Indeed, Article 74, as interpreted, construed and applied by the Court of Appeal in this case, plainly violates petitioners' constitutional rights.

On the basis of the foregoing authorities and for the reasons hereinabove assigned, we respectfully submit that the Court of Appeal erred in holding that Article 74 permits this action to be maintained in Caddo Parish and in overruling petitioners' Exceptions of Improper Venue.

* * *

Appendix C

(c) Paragraph 52 of the Answer of The Associated Press (R. 279-280)

And now, As A FOURTH SEPARATE AND COMPLETE DEFENSE to the demands asserted by plaintiff herein, defendant The Associated Press with respect shows that:

52

Repeating and adopting all of the allegations hereinabove in this answer set forth, the defendant The Associated Press alleges that the publications complained of in this action related to the activities of the plaintiff as a public figure and to matters of public interest, importance and concern, as to which the defendant The Associated Press had a right to report to the public and as to which the public had a right to be informed; that the publications complained of were within the exercise of the constitutionally protected right of freedom of speech and freedom of the press, as guaranteed and secured by the First and Fourteenth Amendments to the Constitution of the United States, and that the aforesaid publications were made by the defendant The Associated Press in good faith and without malice.

The defendant The Associated Press further alleges that the allowance of any damages to the plaintiff under or by virtue of any rule of law applied by the Courts of the State of Louisiana would amount to a restraint upon and a deterrent to the exercise of the aforesaid constitutional rights so secured and so guaranteed.

Appendix C

(f) Supplemental and Amended Answer of The Associated Press (R. 325-327)

FIRST JUDICIAL DISTRICT COURT

CADDO PARISH, LOUISIANA

No. 160,536

EDWIN A. WALKER

vs.

THE ASSOCIATED PRESS

SUPPLEMENTAL AND AMENDED ANSWER OF THE ASSOCIATED PRESS

NOW INTO COURT, through undersigned counsel, comes THE ASSOCIATED PRESS, one of the defendants in the above numbered and entitled cause, and, subject to and with full reservation of its rights under all exceptions, objections and pleas heretofore filed herein by it, respectfully shows in this supplemental and amended answer to the plaintiff's petition herein, as amended, that:

1

Defendant, The Associated Press, desires to amend Paragraph 7 of the answer which it filed herein on November 5, 1964, so as to make that paragraph read as follows:

"7

"In answer to the allegations of paragraph 7 of plaintiff's petition, as amended, defendant, The Associated Press, admits that on or about October 3, 1962, Van H. Savell, an employee of defendant The Associated Press, prepared and defendant The Associated Press transmitted to defendant

the Times-Picayune Publishing Corporation in the City of New Orleans, Orleans Parish, Louisiana, a news dispatch, a copy of which is annexed to plaintiff's petition, as amended, and marked Exhibit 1, which was thereafter published by defendant The Times-Picayune Publishing Corporation in its newspaper, The New Orleans States-Item, and that defendant The Associated Press transmitted to defendant The Times-Picayune Publishing Corporation additional and other news reports concerning plaintiff, but defendant The Associated Press denies each and every one of the remaining allegations contained in paragraph 7 of plaintiff's petition, as amended."

2

Defendant, The Associated Press, desires to supplement and amend its answer filed herein on November 5, 1964, as follows:

A. By deleting from paragraph 52 so much, and only to much, thereof as reads as follows:

"And now, As a Separate and Partial Defense and in Limitation, Reduction and Mitigation of any Damages to Which Plaintiff Might Otherwise Seem Entitled, defendant The Associated Press shows that:" and by substituting in place thereof the following, to wit:

"And now, as a Fifth Separate and Complete Defense to the demands asserted by plaintiff and based on the alleged publications referred to hereinafter, if any, defendant The Associated Press shows that:"

B. By adding one additional paragraph following paragraph 52 of the original answer of The Associated Press, the additional paragraph to be numbered 52 (a) and to read as follows:

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"52 (a)

"The publications complained of in this action, insofar as they relate to statements made by the Congress of the United States, Senator Stephen M. Young, United States Senator from Ohio, and Senator Wayne Morse, United States Senator from Oregon, and statements made by Representative John J. Rooney, Representative from New York, were fair and true reports of public legislative proceedings and were and are privileged.

"And now, As a Separate and Partial Defense and in Limitation, Reduction and Mitigation of any Damages to Which Plaintiff Might Otherwise seem Entitled, defendant The Associated Press shows that:"

3

Defendant, The Associated Press, reiterates, reaffirms and realleges all of the denials and allegations contained in its original answer, as amended herein.

Wherefore, defendant The Associated Press prays that this answer be deemed good and sufficient and that, after due proceedings had, judgment be rendered herein in favor of defendant The Associated Press and against plaintiff Edwin A. Walker, rejecting his demands and dismissing his petition, all at plaintiff's cost and expense.

Defendant The Associated Press further prays for all orders and decrees necessary and proper in the premises and for full, general and equitable relief.

Hargrove, Guyton, Van Hook and Ramey

By John T. Guyton
John T. Guyton

By Billy R. Pesnell
Billy R. Pesnell
867 Texas Eastern Building
Shreveport, Louisiana.
Attorneys for The Associated Press.

Appendix C

(g) Excerpts From the Jury Instructions Requested by The Associated Press on October 18, 1965 (R. 331-333)

REQUESTED INSTRUCTION No. 3(A)

When a person voluntarily injects himself into a matter of public concern or controversy, he invites free expression of public comment, including criticism, of his speech and action. Comment may take the form of an opinion, criticism, or the form of a conclusion or inference of fact based on or derived from other facts truly stated or otherwise known to the average reader. When comment, whether expressed as opinion, criticism or as a conclusion or inference, relates to such person's public assertions or acts and is fair, then the statements containing the comment are privileged, and the plaintiff cannot recover damages for the publication of any such statement, no matter how severe or unfavorable the comments may be, if the publication was without actual malice.

REQUESTED INSTRUCTION No. 4

The publication of a libelous statement about the conduct and activities of a public figure or public man with respect to matters of public interest, importance and concern, even though the libelous statement is false, is privileged, as a matter of law, unless the libelous statement was published with actual malice. Consequently, if your find that the plaintiff in this action was a public figure or public man at the time the statements in question were made and that the statements so made related to the conduct and activities of the plaintiff with respect to matters of

public interest, importance and concern, then you must return a verdict for the defendants, even though you conclude that the statements so made were and are false, as a matter of act, unless you also find that the statements complained of were published with actual malice.

New York Times Co. v. Sullivan, 376 U. S. 254, 84 S. Ct. 710 (1964);
Garrison v. Louisiana, 379 U. S. 64, 85 S. Ct. 209 (1964);
Henry v. Pearson, No. 89 on the docket of the Supreme Court of the United States (Decided March 29, 1965) (not yet reported);
Pauling v. News Syndicate Co., 335 F. 2d 659 (2d Cir. 1964);
Gilberg v. Goffi, 251 NYS 2d 823;
Pearson v. Fairbanks Publishing Co., Inc. (Superior Court of Alaska, 4th District, No. 10,209);
Walker v. Courier Journal et al., F. Supp. (W. D. Ky. 1965).

REQUESTED INSTRUCTION No. 4(A)

"Actual malice," in this connection, is a term of art, a legal phrase, which must be defined for you. A statement is published with actual malice only when the statement is made with actual knowledge of its falsity, or in reckless disregard of whether the statement is true or false.

New York Times Co. v. Sullivan, 376 U. S. 254, 84 S. Ct. 710 (1964);
Garrison v. Louisiana, 379 U. S. 64, 85 S. Ct. 209 (1964).

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Requested Instruction No. 4 (B)

Actual malice is not established by proof that the defendants, by exercising ordinary care, could have discovered that the statement was false. Mere negligence is not actual malice. Similarly, actual malice is not established by merely showing a general intent to inflict harm. In this context, actual malice means the specific intent to inflict harm by and through falsehood. Actual malice cannot be inferred from the mere fact that a libelous statement has been published, nor can it be inferred from the fact that the libelous statement in question is false.

New York Times Co. v. Sullivan, 376 U. S. 254, 84 S. Ct. 710 (1964);

Garrison v. Louisiana, 379 U. S. 64, 85 S. Ct. 209 (1964);

Henry v. Pearson, No. 89 on the docket of the Supreme Court of the United States (Decided March 29, 1965) (not yet reported).

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(h) Excerpts From the Supplemental Jury Instructions Requested by The Associated Press on October 28, 1965 (R. 337-339)

REQUESTED INSTRUCTION NO. 4

The publication of a libelous statement about the conduct and activities of a public figure or public man with respect to matters of public interest, importance and concern, even though the libelous statement is false, is privileged, as a matter of law, unless the libelous statement was published with actual malice. Consequently, if you find that the plaintiff in this action was a public figure or public man at the time the statements in question were made and that the statements so made related to the conduct and activities of the plaintiff with respect to matters of public interest, importance and concern, then you must return a verdict for the defendants, even though you conclude that the statements so made were and are false, as a matter of fact, unless you also find that the statements complained of were published with actual malice.

New York Times Co. v. Sullivan, 376 U. S. 254, 84 S. Ct. 710 (1964);
Garrison v. Louisiana, 379 U. S. 64, 85 S. Ct. 209 (1964);
Henry v. Pearson, U. S. , 85 S. Ct. 992, 13 L. Ed. 2d 892 (1965);
Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281, (1908);
Pauling v. News Syndicate Co., 335 F. 2d 659 (2d Cir. 1964);
Gilbert v. Goffi, 251NYS 2d 823;

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Pearson v. Fairbanks Publishing Co., Inc. (Superior Court of Alaska, 4th District, No. 10,209);

Walker v. Courier Journal et al., F. Supp. (W. D. Ky. 1965).

REQUESTED INSTRUCTION No. 4 (A)

A person who voluntarily injects himself into a matter of public debate, concern or controversy is deemed to be a public man or public figure. If you find that the plaintiff, by either speech or conduct, voluntarily injected himself into a matter of public debate, concern or controversy and the publications alleged to be libelous relate to the conduct or activities of the plaintiff as a public man or public figure, then you must return a verdict for the defendants, even though you find the publications complained of were false in fact, unless you also find that the publications complained of were made with actual malice.

New York Times Co. v. Sullivan, 376 U. S. 254, 84 S. Ct. 710 (1964);

Garrison v. Louisiana, 379 U. S. 64, 85 S. Ct. 209 (1964);

Henry v. Pearson, U. S. , 85 S. Ct. 992, 13 L. Ed. 2d 892 (1965);

Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281, (1908);

Pauling v. News Syndicate Co., 335 F. 2d 659 (2d Cir. 1964);

Gilbert v. Goffi, 251 NYS 2d 823;

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Pearson v. Fairbanks Publishing Co., Inc. (Superior Court of Alaska, 4th District, No. 10,209);
Walker v. Courier Journal et al., F. Supp. (W. D. Ky. 1965).

Requested Instruction No. 4 (B)

"Actual malice," in this connection, is a term of art, a legal phrase, which must be defined for you. A statement is published with actual malice only when the statement is made with actual knowledge of its falsity, or in reckless disregard of whether the statement is true or false. To establish actual malice, the burden is upon the plaintiff to prove by a fair preponderance of the evidence that the publications complained of were made by the defendants with knowledge of their falsity or in reckless disregard of whether the publications complained of were true.

New York Times Co. v. Sullivan, 376 U. S. 254, 84 S. Ct. 710 (1964);
Garrison v. Louisiana, 379 U. S. 64, 85 S. Ct. 209 (1964).

Requested Instruction No. 4 (C)

Actual malice is not established by proof that the defendants, by exercising ordinary care, could have discovered that the statement was false. Mere negligence is not actual malice. Similarly, actual malice is not established by merely showing a general intent to inflict harm. In this context, actual malice means the specific intent to inflict harm by and through falsehood. Actual malice cannot be inferred

from the mere fact that a libelous statement has been published, nor can it be inferred from the fact that the libelous statement in question is false.

New York Times Co. v. *Sullivan*, 376 U. S. 254, 84 S. Ct. 710 (1964);
Garrison v. Louisiana, 379 U. S. 64, 85 S. Ct. 209 (1964);
Henry v. Pearson, . U. S. , 85 S. Ct. 992, 13 L. Ed. 2d 892 (1965).

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(1) Excerpts From the Exceptions of The Associated Press to the Court's Charge to the Jury (R. 391-393)

No. 160,536

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

EDWIN A. WALKER

vs.

THE ASSOCIATED PRESS *et al.*

EXCEPTIONS OF DEFENDANT, THE ASSOCIATED PRESS, TO THE COURT'S CHARGE TO THE JURY

Now into Court, through undersigned counsel, comes defendant, THE ASSOCIATED PRESS, who respectfully excepts to the charge of the Court in the following respects, to wit:

* * *

2

The statement in the Court's charge that:

> "Malice is either ill will or a reckless disregard of the truth."

is not a correct statement of the law. Under the law applicable to this case, a statement is published with actual malice only when the statement is made with actual knowledge of its falsity or in reckless disregard of the truth. Actual malice means the specific intent to inflict harm by and through falsehood.

* * *

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Defendant, The Associated Press, excepts to the failure or refusal of the Court to charge the jury in accordance with defendant's request for special instructions filed herein on October 28, 1965, as follows:

Requested Instruction No. 2 (A);
Requested Instruction No. 2 (B);
Requested Instruction No. 2 (C);
Requested Instruction No. 2 (D);
Requested Instruction No. 2 (E);
Requested Instruction No. 4 (B);
Requested Instruction No. 4 (C);
Requested Instruction No. 6;
Requested Instruction No. 6 (A);
Requested Instruction No. 6 (B);
Requested Instruction No. 6 (C);
Requested Instruction No. 6 (D).

Respectfully submitted,

WELLS, THOMAS & WELLS

By /s/ EARL T. THOMAS
Earl T. Thomas
Lamar Life Building,
Jackson, Mississippi.

HARGROVE, GUYTON, VAN HOOK AND RAMEY

By /s/ JOHN T. GUYTON
John T. Guyton

By /s/ BILLY R. PESNELL
Billy R. Pesnell

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(j) Excerpts From the Motion of The Associated Press for a New Trial (R. 399-408, 410, 411-413)

No. 160,536

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

EDWIN A. WALKER

vs.

THE ASSOCIATED PRESS *et al.*

MOTION FOR A NEW TRIAL

NOW INTO COURT, through undersigned counsel, come defendants, THE ASSOCIATED PRESS and THE TIMES-PICAYUNE PUBLISHING CORPORATION, defendants in the above numbered and entitled cause, who, with full reservation of their rights under all objections, exceptions and pleas heretofore filed herein by them, whether separately or jointly, move the Court to grant them a new trial in this matter, and, as grounds therefor, respectfully represent that:

1

Defendants were denied the right to a fair and impartial trial, as guaranteed by the Seventh and Fourteenth Amendments to the Constitution of the United States, and the right of due process of law, which includes the right to a fair and impartial trial, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, for the reasons and on the grounds hereinafter set forth.

(a) In his closing argument to the jury, counsel for plaintiff made a direct appeal to the bias, prejudice

and passion of the jury by asserting, among other things:

(1) That the news media in general was and is responsible for the racial conflicts and troubles that have occurred in the South. More specifically, in this connection, counsel for plaintiff argued:

"Now, moving on with one or two other of General Walker's concepts. General Walker believes, and I concur, that integration should be accomplished person to person and not government to the people. It must be based upon mutual understanding and respect, which can be accomplished if they just keep their big hands out of it.

"We have had a great deal of talk about people coming in from the outside. What I am asking you gentlemen is who is coming in from the outside? And is endeavoring to destroy the natural bond of affection that exists between the wonderful colored people with whom we all have grown up and lived all of our lives, and is changing that bond of affection into a feeling of frustration, irritation, hate, and anarchy. It is the news media of the United States who is telling these people over and over and over again: 'You are being abused. You are not being done right. Freedom--Freedom—freedom now.' Putting in all these collateral sources of hate; whereas, what they should be saying is that the colored people in America are progressing fantastically; that you have, as demonstrated in the South, a bond of affection with your fellow citizens that can and should be expanded into the type of acceptance that will accomplish real integration and not political integration. That is

what the press should be telling them. That the accomplishments and the attainments of the colored people in America are without parallel in the world. 'Give us a little time and cooperate with us and be a little better citizens. In fact, it won't be too large a problem for you colored people to be even better citizens than the white folks.' Now, that kind of concept will put oil on the troubled waters. But the things we are receiving, gentlemen, will lead to bloodshed, anarchy, hatred, poison, and to destruction of the United States of America." (See Closing Arguments on behalf of Plaintiff, pages 16-17.)

(2) That, in response to the efforts of the plaintiff, Edwin A. Walker, to "save our country and mankind," he was "smeared by the left-wing liberal press in the most ruthless, carefully contrived wave of propaganda that I have ever seen." (See Closing Arguments on behalf of Plaintiff, pages 12-13.)

(3) That the issue involved in this lawsuit "is the survival of the United States of America itself in this conflict with an all-powerful enemy," (See Closing Arguments on behalf of Plaintiff, page 15) thus attempting to create the impression that defendants were and are the instruments and agents of the Communists and that it was the patriotic duty of the jury to return a verdict in favor of the plaintiff, Edwin A. Walker.

(4) That chief counsel for defendant, The Associated Press, Mr. Earl T. Thomas, did not believe in his own case, which was stated as a fact to the jury (See Closing Arguments on behalf of Plaintiff, pages 22

and 27), and as to which there was no evidence, and which, in substance and effect, charged counsel for defendant, The Associated Press, with suborning perjury, without any factual basis or foundation whatsoever for the charge.

(5) That, insofar as the press is concerned, ". . . Reverend Martin Luther King can do no wrong and Major General Edwin A. Walker can do no right. That is the overwhelming, frustrating force that we are fighting in this lawsuit. And the outcome of it will depend on however you gentlemen handle it." (See Closing Arguments on behalf of Plaintiff, page 30.)

(6) That ". . . every dollar that goes into this verdict will go back into the cause of freedom." (See Closing Arguments on behalf of Plaintiff, page 33), as to which there was no evidence and which, in any event, was completely irrelevant and immaterial.

The transcript of the "Closing Arguments on behalf of Plaintiff" showing the foregoing arguments, statements and contentions made by counsel for plaintiff, Edwin A. Walker, is attached hereto and made a part hereof. The foregoing arguments, statements and contentions made by counsel for plaintiff, Edwin A. Walker, in his closing arguments were completely irrelevant and immaterial to any issue involved in this case and unsupported by any evidence and were calculated and designed to, and did, improperly influence the jury by arousing and inflaming their passion, prejudice, bias and emotion and thereby deprived the defendants of their right to a fair and impartial trial, due process of law and substantial justice.

(b) During the course of the trial, on three separate occasions, spectators seated in the courtroom broke into applause or approving laughter in response to statements made by the plaintiff, Edwin A. Walker, or by counsel on his behalf. More specifically, on Friday, October 22, 1965, the plaintiff, Edwin A. Walker, after reading from the witness stand a statement which he broadcast over "Party Line" on Radio Station KWKH in Shreveport, Louisiana, on September 26, 1962, added, "I was there!" whereupon, the audience seated in the courtroom burst into applause. Later on the same day, when the plaintiff, Edwin A. Walker, was questioned about the oath of office he took upon receiving his commission in the United States Army, he stated that he did not think the matter referred to was contained in the oath administered at that time and then added, "It may be now. I don't know what they have done, because they are changing everything; . . ." whereupon the spectators seated in the courtroom broke into a hearty approving laugh. Again, on October 29, 1965, many of the spectators seated in the courtroom broke into applause at the conclusion of the closing argument made by counsel on behalf of plaintiff, Edwin A. Walker, knowing that such conduct was improper. The demonstrations referred to herein were calculated and designed to improperly influence the jury to the prejudice of the defendants and to create an atmosphere in which the defendants could not obtain a fair and impartial trial.

(c) Despite the specific instructions of the Court to the jury that "No one may recover more for any item of damage than the amount sued for. You may find for less than is claimed but not in excess of that amount." and notwithstanding the fact that the amount claimed by the plaintiff,

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Edwin A. Walker, in his petition was limited to $2,250,000.00, the jury, neverthless, returned a verdict in favor of the plaintiff, Edwin A. Walker, and against defendants, The Associated Press and The Times-Picayune Publishing Corporation, in solido, for the sum of $3,000,000.00 after deliberating for only one hour and fifty-five minutes, the verdict thus exceeding the amount claimed by the sum of $750,000.00, in violation of the specific instructions of the Court and the oath taken by the jury.

At the beginning of the trial, the Court specifically ordered the jury not to discuss the case with anyone or even among themselves until they had heard all of the evidence and had begun their formal deliberations, and not to read the newspaper reports or listen to any radio or television broadcasts relating to the trial of this case. At no time during the course of the trial was the amount of $3,000,000.00 mentioned in the presence of the jury, duly assembled and convened in open court, as the amount claimed by the plaintiff as damages or otherwise, and, therefore, it is apparent that the jury, or some member(s) of the jury, received information outside of the Court which was considered by the jury during their deliberations.

(d) The verdict returned by the jury in this case in the amount of $3,000,000.00 is so extravagant in amount as to outrun the bounds of reason and is so grossly and flagrantly excessive that it cannot be accounted for on any ground other than prejudice, passion and bias. The size of the verdict alone shows that the minds of the jurors were so dominated by passion and prejudice that they were incapable of considering the evidence and unable to appreciate and apply the testimony as to the question of liability, thus vitiating the entire proceeding, and the Fifth, Seventh

and Fourteenth Amendments to the Constitution of the United States, which guarantee defendants the right to a fair and impartial trial and due process of law, prohibit the imposition of any judgment against defendants based on the aforesaid verdict, regardless of any remittitur ordered by the Court or voluntarily consented to by the plaintiff. Remittitur cannot cure and will not remove the fundamental defect of prejudice and passion which inheres in the aforesaid verdict, the only remedy for which is a new trial.

2

Defendants were denied the right of due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, in that:

(a) By Court order dated October 23, 1964, the plaintiff's claim was limited to causes of action based on Associated Press news dispatches published by The Times-Picayune Publishing Corporation in its newspapers, The Times-Picayune and The New Orleans States-Item. The jury was not informed or instructed by the Court as to what specific publications the plaintiff's claim was based upon and for which damage, if any, was to be assessed in the event that the jury should find for the plaintiff. This was a matter of vital importance, particularly in view of the fact that other publications were admitted by the Court over objection by defendants solely on the issue of malice. Moreover, Associated Press news dispatches were introduced in evidence which were not published by The Times-Picayune Publishing Corporation. For these reasons, it was imperative that the jury be informed and instructed as to the precise publications on which the plaintiff's claim

was based and for which damage, if any, was to be assessed in the event that the jury should return a verdict for the plaintiff. Despite repeated requests by defendants, through their counsel, that counsel for plaintiff specify the specific and particular publications which they contended constituted the cause or causes of action for which damages were being claimed, counsel for plaintiff refused to do so. Consequently, it is impossible to know or ascertain what publications were submitted to the jury for its decision on the question of liability, or what publications the jury based its award of damages on, and the jury could not rationally and intelligently perform its duty and function without this vital information.

(b) During his closing argument to the jury, counsel for plaintiff urged the jury to award plaintiff damages not less than an amount equal to $1,000.00 for each of the 1250 newspaper members of The Associated Press, although there was no evidence that all of the newspaper members of The Associated Press published any of the news dispatches of The Associated Press introduced in evidence in this case, and notwithstanding the order of the Court dated October 23, 1964, by which the plaintiff's claim was limited to news dispatches transmitted by The Associated Press to the Times-Picayune Publishing Corporation and published in its newspapers, The Times-Picayune and The New Orleans States-Item. More specifically, in this connection, counsel for plaintiff told the jury:

> "Now, what is it worth? There are 1250 member papers of the Associated Press. . . . 1250 member papers. A thousand dollars apiece would be a bargain to them. . . . A thousand dollars apiece for all these news media, for all the newspapers, would

let the radios off free, would let the televisions off free, and it would let the foreign newspapers off free, and it would be just a fraction of the dollars they brought in for this sensational and phony story concerning General Walker. . . ." (See Closing Arguments on behalf of Plaintiff, page 32.)

To permit the plaintiff to recover in this action damages for publication of the alleged libelous statements by other newspaper members of The Associated Press denies defendants due process of law because there is no evidence in this record that the alleged libelous statements were published by 1250 newspaper members of The Associated Press and would allow the plaintiff to recover damages for the same injury, if any, more than once. In light of the foregoing argument by counsel for plaintiff, defendants renewed their request that the Court instruct the jury that the plaintiff's right to recover damages in this action, if at all, was limited to such damages as he may have sustained by reason of the publication of the news dispatches of defendant, The Associated Press, in the newspapers, The Times-Picayune and The New Orleans States-Item. The Court refused to so instruct the jury, thereby, in effect, approving the argument as being oprrect.

(c) The scope of inquiry and latitude which the Court allowed counsel for the plaintiff was so broad and so far outside of the issues disclosed by the pleadings in this case and unrestricted by any ascertainable standard of relevance that defendants were denied due process of law. Under the guise of proving malice, counsel for plaintiff was allowed, over objection of the defendants, to go into alleged Communist infiltration of the press, so-called alleged slanting of the news, the editorial policy of The Times-Picayune

and The New Orleans States-Item, before and after their acquisition by Samuel Newhouse, who owns a number of other newspapers published in the United States, the alleged failure of the press to identify and point out to the public Communists involved in the various "civil rights" organizations and otherwise, among other things, none of which proves, or even tends to prove, malice. Plaintiff was also permitted to introduce, over defendants' objections, other publications made by defendants with respect to certain judicial proceedings in which the plaintiff was involved, which were not claimed to be libelous, and to interrogate various witnesses with respect to the alleged failure of defendants to publicize certain matters, none of which had any tendency to prove malice according to the standard laid down by the Supreme Court in:

New York Times Co. v. *Sullivan*, 376 U. S. 254, 84 S. Ct. 710 (1964);
Garrison v. *Louisiana*, 379 U. S. 64, 85 S. Ct. 209 (1964); and
Henry v. *Pearson*, U. S. , 85 S. Ct. 992, 13 L. Ed. 2d 892 (1965);

which is applicable here. By admitting this evidence over defendants' objections, the Court in effect told the jury that they could consider it as evidence of malice. The pleadings filed by the plaintiff do not and cannot reasonably be said to have given defendants notice of the foregoing factual contentions and an adequate opportunity to meet them, as required by due process of law.

(d) To permit the plaintiff to recover damages against defendants for his alleged arrest and incarceration by authorities of the United States at the U. S. Medical Center

in Springfield, Missouri, for the alleged deprivation of plaintiff's constitutional rights by officials of the United States and for alleged illegal Court order entered by the United States District Court in and for the Northern District of Mississippi for the psychiatric examination of the plaintiff is a denial of due process of law where, as here, there is no evidence showing that the acts and conduct referred to herein were caused by defendants.

(e) Throughout the trial of this case, counsel for plaintiff contended that the alleged libelous statement complained of, that is, that plaintiff led a charge against the U. S. Marshals, defamed plaintiff by imputing insanity to him, a point which was emphasized by counsel for plaintiff in their closing arguments to the jury. (See Closing Arguments on behalf of Plaintiff, p. 4, p. 9, p. 10, p. 16, p. 24, p. 25.) Counsel for plaintiff admitted in open court that the news dispatches transmitted by defendant, The Associated Press, and published by defendant, The Times-Picayune Publishing Corporation, in connection with the order of the United States District Court in and for the Northern District of Mississippi for a psychiatric examination of plaintiff and the judicial proceedings intident thereto held on the 20th and 21st days of November, 1962, were not libelous, and these publications were admitted in evidence by the Court solely on the issue of malice. The alleged libelous statement that the plaintiff led a charge against U. S. Marshals cannot fairly and reasonably be construed or interpreted as defaming the plaintiff by imputing insanity to him or as reflecting on his mental condition in any way, and to do so, as was done here, is a denial of due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

(f) The verdict of the jury returned Ocober 29, 1965, and the judgment of the Court rendered thereon on November 4, 1965, notwithstanding the remittitur voluntarily consented to by plaintiff, is so grossly excessive that it constitutes a denial of due process of law.

3

The First and Fourteenth Amendments to the Constitution of the United States, which guarantee freedom of speech and freedom of the press, absolutely prohibit the imposition of any judgment herein against defendants because:

(a) As a matter of law, the evidence shows that the alleged libelous statements complained of were and are substantially true; and

(b) As a matter of law, there is no evidence of malice, or, in any event, the evidence is constitutionally inadequate and insufficient to support any judgment in favor of the plaintiff, or any finding of malice.

The judgment and verdict of the jury is so grossly excessive in amount that it constitutes a burden on freedom of speech and freedom of the press, as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

* * *

The verdict of the jury returned on October 29, 1965 and the judgement of the Court read, signed and rendered thereon on November 4, 1965, is contrary to the law and the evidence in the following respects:

(a) The Court erred in failing to instruct the jury that the plaintiff could not be awarded any punitive damages, or damages designed to punish defendants, as requested by

defendants in their Requested Instruction No. 6 (B), particularly after counsel for plaintiff had argued in his closing argument to the jury:

> "There are 1250 member papers of the Associated Press. *Those people need a lesson. . . .*" (Emphasis added)
>
> (See Closing Arguments on behalf of Plaintiff, page 32.)
>
> "Anything less than $1,250,000 is absolutely inadequate contribution to General Walker and is no *retribution* to the malicious, vicious, vile creation by the Associated Press of a false public image of a man as I said whose concepts of duty, honor, country reach a sublime plane of unselfishness." (Emphasis added)
>
> ". . . with the fate of the whole world and particularly with the destiny of General Walker in your hands I might say that every dollar that goes into this verdict will go back into the cause of freedom." (See Closing Arguments on behalf of Plaintiff, page 33.)

* * *

(f) The Court erred, as a matter of law, in charging the jury that "Malice is ill will or a reckless disregard of the truth." Malice is not ill will. Under the law applicable to this case, a libelous statement is published with actual malice only when the statement is made with knowledge of its falsity or in reckless disregard of the truth. Actual malice means the specific intent to inflict harm by and through falsehood. Defendants timely excepted to this erroneous instruction of the Court.

(g) The Court erred in failing to instruct the jury that, as a matter of law, the failure of a grand jury to indict a person accused of a crime cannot be considered as exoneration from guilt of the crime with which the accused has been charged, or as evidence of the innocence of the accused, as requested by defendants in their Requested Instruction No. 2 (E), particularly after counsel for plaintiff, in his closing argument to the jury, had argued:

> "....incidentally, I suggest to you that had General Walker led a charge against the United States marshals on that tragic occasion today he would be in Leavenworth or Springfield, because the United States Government had all the power of the F. B. I., and all the power of those assembled marshals, . . .? . . . If General Walker had led a charge, gentlemen of the jury, he would today be in Springfield rather than having the charges dismissed against him, the charges by the U. S. attorney, . . ." (See Closing Arguments, on behalf of Plaintiff, page 15. See, also, page 25.)

(h) The Court erred in failing to instruct the jury that the plaintiff's right to recover damages in this action, if at all, is limited to such damages as he may have sustained by reason of the publication of the news dispatches of defendant, The Associated Press, in the newspapers, The Times-Picayune and The New Orleans States-Item, as requested by defendants in their Requested Instruction No. 6, and as the Court ruled in its first Pre-Trial Order dated October 23, 1964, particularly after counsel for plaintiff had argued in his closing argument to the jury:

"Now, what is it worth? There are 1250 member papers of the Associated Press. . . . 1250 member papers. A thousand dollars apiece would be a bargain to them. . . . A thousand dollars apiece for all these news media, for all the newspapers, would let the radios off free, would let the televisions off free, and it would let the foreign newspapers off free, and it would be just a fraction of the dollars they brought in for this sensational and phony story concerning General Walker. . . ."

(See Closing Arguments on behalf of Plaintiff, page 32.)

(i) The Court erred in failing to instruct the jury, as requested by defendants in their written request for instructions filed herein on October 28, 1965, as follows:

Requested Instruction No. 2 (A);
Requested Instruction No. 2 (B);
Requested Instruction No. 2 (C);
Requested Instruction No. 2 (D);
Requested Instruction No. 2 (E);
Requested Instruction No. 4 (B);
Requested Instruction No. 4 (C);
Requested Instruction No. 6;
Requested Instruction No. 6 (A);
Requested Instruction No. 6 (B);
Requested Instruction No. 6 (C);
and
Requested Instruction No. 6 (D);

all of which are hereby incorporated herein by reference, to the same extent and with the same effect as if they had been copied and set out herein in full.

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(j) As a matter of law, the evidence established that the alleged libelous publications complained of herein by the plaintiff were and are substantially true.

(k) As a matter of law, the evidence herein is wholly inadequate and insufficient to show or establish malice on the part of defendants, or either of them. There is no evidence of malice.

(l) The Judgment of the Court, entered on the verdict of the jury, is contrary to the law and the weight of the evidence, insofar as liability is concerned, and is grossly excessive in amount, notwithstanding the remittitur.

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(k) Excerpts From the Brief of The Associated Press on Appeal to the Court of Appeal, Second Circuit, State of Louisiana (pp. 40-79, 82-140)

ASSIGNMENT OF ERROR NO. 1

The judgment of the District Court is manifestly erroneous because the evidence in this action clearly shows that the publications complained of were true in substance and in fact.

The only portions of the publications cited that are alleged to be libelous are statements that:

(1) The plaintiff led a charge against the United States Marshals stationed on the campus to protect James H. Meredith; and

(2) The plaintiff assumed command of the crowd that gathered on the campus on the evening of September 30, 1962.

Truth is a complete defense to a civil action for libel. Section 3602 of Title 13, Louisiana Revised Statutes of 1950, provides:

> "Whenever any civil suit for slander, defamation, or for libel, shall be instituted in any court of this state, it shall be lawful for the defendant to plead in justification the truth of the slanderous, defamatory or libelous words or matter, for the uttering or publishing of which he may be sued; and in the trial of the issue in such suit, to maintain and prove his plea by all legal evidence."

Pool v. *Gaudin*, 209 La. 218, 24 So. 2d 383 (1945);

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Kennedy v. *Item Co.*, 197 La. 1050, 3 So. 2d 175 (1941);
Otero v. *Ewing*, 165 La. 398, 115 So. 633 (1927);
Barbre v. *Morgan*, 157 La. 753, 103 So. 32 (1925);
Addington v. *Times Pub. Co.*, 138 La. 731, 70 So. 784 (1916).

In establishing a defense of truth in an action for libel, the defendant is not required to prove that every detail or factual particular recited is completely accurate. Inaccuracies or misstatements which do not affect the purport or the substance of the alleged libelous publications are immaterial.

Kennedy v. *Item Co.*, 197 La. 1050, 3 So. 2d 175 (1941);
Otero v. *Ewing*, 165 La. 398, 115 So. 633 (1927);
Addington v. *Times Pub. Co.*, 138 La. 731, 70 So. 784 (1916).

In *Otero* v. *Ewing*, supra, the Supreme Court held, at page 636:

". . . In making proof of the truth of the alleged libelous article, it is not necessary to prove the truth of every unimportant detail in it, but it is sufficient to prove that the charges therein contained are substantially true."

In *Addington* v. *Times Pub. Co.*, supra, the Supreme Court held, at page 786:

". . . Our conclusion, from an examination of the evidence, is that the newspaper report complained

of is substantially true, and that the purport of it is not materially affected by its inaccuracies."

When the truth is so near the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain the claim of libel, the publication is not actionable.

Kennedy v. *Item Co.*, 197 La. 1050, 3 So. 2d 175 (1941);
Otero v. *Ewing*, 165 La. 398, 115 So. 633 (1927).

The news dispatches furnished by the defendant The Associated Press to the defendant The Times-Picayune Publishing Corporation on which this action is based were either written by or based upon information furnished to the defendant The Associated Press by its reporter, Van Savell, who was on the campus of the University of Mississippi on the evening of September 30, 1962, during the rioting. (R. 2536-2537, 2645. See also R. 811-814.)

The truth of these news dispatches and the statements alleged to be libelous is sustained in every important respect by witnesses for both the plaintiff and the defendants.

We turn now to a consideration of the activities of General Walker on the campus of the University of Mississippi on the evening of September 30, 1962.

1. General Walker's Activities Before the Speech at the Monument

(a) Evidence of the Plaintiff

According to General Walker, there were approximately 70 people standing in the general area of the monument

when he first arrived there. (R. 1980). He heard three or four people remark, "Here is General Walker," and "Here is our leader." Most of them wanted to be introduced and say "Hello." (R. 1980) After he had been on the campus for ten or fifteen minutes, three or four people came up to shake hands, saying, "Will you lead us?" His "answer" was "always ignoring the question." (R. 1981) Some of the people who greeted him were wearing T-shirts and were sweaty. (R. 1979) Immediately after he arrived, someone asked him, "Where are the volunteers?" According to General Walker, he would not answer this question. (R. 1980)

This testimony of General Walker in this connection stands out in sharp contrast with accounts of the witnesses who were called to testify on his behalf. Talmadge Witt, a Deputy Sheriff of Pontotoc County, Mississippi, was one of these witnesses. In describing the effect on the crowd of General Walker's appearance on the campus, Witt testified that remarks such as "General Walker is here. Here is our leader. Our leader has arrived," went out over the crowd like a wave. (R. 1276, 1317, 1333) The crowd "lighted up" and became more enthusiastic when General Walker appeared; the difference in their attitude and demeanor was apparent. (R. 1276, 1317) The students, and Witt himself, were anxious to see General Walker.[5] (R. 1275-1276) According to Louis Leman, there was a large

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[5]Many of the students, of course, had heard General Walker's appeal for thousands to come to Mississippi and stand behind Governor Barnett. This is evident because four of the students called by the plaintiff as witnesses in this case had heard General Walker's appeals. These were Sweat (R. 974), Jackson (R. 1391), Holmes (R. 1417-1418) and Hunter (R. 1645). In addition, two of the students called by the defendants as witnesses had heard of the appeals made by General Walker. These were Hill (R. 2136) and Smith (R. 2241). In addition to the students, Reverend Duncan Gray (R. 2449), Dean Love (R. 2074) and Tom Gregory (R. 2179) were all familiar with the public appeals made by General Walker.

crowd of approximately 200 people in the vicinity of the monument when he and General Walker first arrived there. (R. 1238-1239) At that time, the marshals were moving out into the Circle and it "looked like they were trying to drive everybody back." (R. 1211, 1240) The people in the crowd were glad to see General Walker (R. 1240) and a lot of people said, "Here is our leader." (R. 1210)

Many of the witnesses who testified at the trial were students at the University. At the time of the riot, they rushed down to the monument to greet General Walker. (See, e.g., R. 985-986, 1351, 1381, 1407, 1646-1647.) Danny Hunter and Sidney Holmes, both of whom testified as witnesses on behalf of the plaintiff, were standing in front of the YMCA Building when they heard the cry go over the crowd, "General Walker is here." (R. 1646, 1407) When they arrived at the monument, General Walker was standing in the street. (R. 1641-1642, 1407) According to Hunter, he made his way up through the people who were accumulating around General Walker and shook hands with him. (R. 1641) At that time Hunter estimated that there were 12 to 15 people congregated around General Walker, but the crowd continued to get bigger all the time. (R. 1647) As Hunter put it, he "got there before any of the most of them got there." (R. 1647) The people were running up to General Walker and introducing themselves. (R. 985-986) Richard H. Sweat,* one of the plaintiff's witnesses, testified that he "tried to get close to him (General Walker) the first time I saw him, but I couldn't." (R. 989) As plaintiff's witness Holmes put it, General Walker "was somebody we all knew,

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*Sweat was employed by General Walker during the summer of 1964. (R. 987) As part of his duties, he arranged for all of plaintiff's witnesses to attend the trial in this case. (R. 988)

somebody we could consider a leader and he was an adult." (R. 1418)

Shortly after General Walker first appeared on the campus in the vicinity of the monument, and as the people were telling him about what had transpired and describing the protest which was being made, Talmadge Witt heard General Walker say with reference to the comments then being made, "Good, Good. Keep it up."[7] (R. 1311, 1333) At this time, the students were asking General Walker if he would lead them. (R. 1384, 1240, 1407-1408) General Walker did not answer these questions. (R. 1361, 1384, 1408)

From the area of the monument, General Walker, accompanied by two adults (R. 1419-1420), one of whom was obese (R. 1384-1385), moved toward the Lyceum in company with "several other people." (R. 1384-1385, 1419-1420, 1482) Talmadge Witt testified that it was quite a big crowd. (R. 1317-1318, 1333) According to plaintiff's witnesses, the group continued until it reached the vicinity of the flagpole. (R. 1384-1385, 1421, 1487) At that point, they encountered tear gas (R. 1316, 1487) and some of the people around them may have run, "because there were tear gas canisters coming all through there." (R. 1363)

(*b*) Evidence of the Defendants

A large crowd gathered around General Walker in the vicinity of the Confederate monument minutes after he arrived there and as he stood in University Avenue conferring with a group of ten to fifteen students. The students

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[7] Plaintiff's witness Richard H. Sweat also heard General Walker say, "Keep up the protest." (R. 998) The record is not entirely clear as to which witness heard General Walker make this remark. General Walker testified that he did not make this statement at any time during the night. (R. 2004-2005)

were shouting, "The General is here. General Walker is here," and news of his arrival spread quickly, almost spontaneously, through the crowd on the campus. (R. 2340-2344) General Walker stood in the vicinity of the Confederate monument talking to various people in the crowd, asking questions about what had happened. Among other things, General Walker was heard to ask how long has "this" been going on, and, when someone replied an hour or an hour and a half, General Walker said, "Keep it up all night. We have got more people coming." (R. 2143) One of the students told General Walker that a television cameraman's car had been wrecked and his equipment destroyed,[8] to which General Walker was heard to say, "Good, Good." (R. 2143) During this time, one of the students who had been injured was brought up,[9] and, after he had examined the wound, General Walker was heard to say, "This protest is going to be heard around the world."[10] (R. 2343) Throughout this time, the students were begging General Walker to lead them, and to tell them what to do. (R. 2143, 2343)

After standing in the vicinity of the monument for a few minutes, General Walker began walking toward the Lyceum Building at a brisk pace, with two or three people shoulder to shoulder with him (R. 2180, 2344), one of whom was a heavy-set man, weighing at least 250 pounds, with whom General Walker was observed conferring. (R. 2145) The crowd which had assembled in the vicinity of the monument, and which was armed with rocks and

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[8]General Walker admits that the students did tell him about beating up a "press" car at this time. (R. 1925)

[9]General Walker admits that this occurred while he was standing in University Avenue and, upon examining the wound, he said: "Take the boy down the street and put him in the car and carry him to the hospital." (R. 1982-1983)

[10]General Walker admits that he told the students, "You will be heard all over the world." (R. 1999-2000)

bricks and bottles, fell in behind General Walker and followed him past the north-south crosswalk into the northwest quadrant of the Circle, where the bricks, rocks and other missiles were thrown at the marshals. (R. 2144-2146, 2181, 2343-2345) The marshals fired tear gas and dispersed the crowd. (R. 2145, 2182, 2345) As the crowd moved westward behind General Walker, there were yells and shouts of "General Walker will lead us. The marshals won't stop him" and "Rally to General Walker." (R. 2181)

Tom Gregory, a reporter for The Meridian Star, witnessed General Walker's march toward the marshals.

TOM GREGORY

Gregory, 30 years of age and a graduate of the University of Mississippi, was called as a witness for the defendants. (R. 2173)

In September 1962, he was employed as a reporter for The Meridian Star. (R. 2174)

Gregory testified that he arrived on the campus of the University of Mississippi about dark on September 30 (R. 2175) and remained there during the evening (R. 2187-2188).

Gregory's account of the charge led by General Walker was published in The Meridian Star the next day. (R. 2182-2183) The report (APD-39), which is set forth in full in the Appendix to this brief (pp. 9-13), reads, in part, as follows:

"THE MERIDIAN STAR

"Meridian, Miss., Monday, October 1, 1962

"Students Rally to Leadership of Ex-General

"Outsiders Take Part In Campus Rioting

"By TOM GREGORY

"Star Staff Writer

Appendix C

"OXFORD, Miss.—Into the mob walked Edwin C. Walker, former major general of the United States Army.

"Around him swirled a whirlpool of humanity and human emotion. Two hundred yards away, a line of gas-masked, club and tear gas-armed federal marshals had turned the ancient Lyceum building into a federal fort.

" 'Now we have a leader,' screamed somebody. 'Rally to General Walker!'

"Walker, wearing a Texas hat and a dark blue suit, walked toward the Lyceum, with perhaps 200 men following him.

" 'Tear gas won't stop him,' another person yelled. 'Follow General Walker.'

"About 50 yards from the federal line, tear gas bombs began falling around the group.

"General Edwin Walker (retired), who wouldn't retreat, did.

"ONE OF MANY

"The former Army officer was just one of the number of outsiders—how many will probably never be known—who egged and aided a hard core of Ole Miss students into a rock flinging, destructive riot that left two dead, 75 to 100 injured, at least 31 arrested and seriously damaged the reputation of a university.

"I walked through that howling, passionately unthinking mob for more than four hours during the

violence here last night. I saw the rock throwers and the agitators.

"I stood under a Confederate flag hoisted on the flag pole before the stately Lyceum and watched students and outsiders rush the marshals' line, retreat before tear gas, regroup and charge again —all without any attempt at control."

This account of General Walker's activities on the campus is substantiated in every material respect by John Charles Hill.

JOHN CHARLES HILL

In September 1962, John Charles Hill was a student at the University of Mississippi and a stringer for Columbia Broadcasting System. (R. 2135) A stringer for Columbia Broadcasting System is an individual who carries film, sets up interviews and does menial tasks as directed by CBS. (R. 2135)

Hill spent the early part of Sunday, September 30, with his parents in Jackson. (R. 2136) He returned to the campus at about 5:30 P.M. (R. 2136) As he approached the Lyceum Building he saw the marshals and a large crowd that had gathered near them. (R. 2137) Upon seeing the crowd he felt he should report to the CBS headquarters in the Ole Miss Motel. (R. 2137)

At about 8:15 P.M., Hill returned to the campus with a portable tape recorder. He felt that he could get some recordings of the riot which would be perhaps of some newsworthy value. (R. 2141) While standing in the area in front of the old Geology Building, he heard people say,

"Let him through, let him through. Here is our leader. Here is General Walker." (R. 2143)

Hill proceeded with his tape recorder to a point that General Walker was approaching directly in front of the Confederate monument. (R. 2143) A group of several hundred people surrounded General Walker. (R. 2144) General Walker stood in the vicinity of the Confederate monument talking to various people in the crowd which had gathered around him, asking questions about what had happened. (R. 2143) Hill heard General Walker ask, among other things, "How long has 'this' been going on?" When someone replied, "an hour or an hour and a half," Hill heard General Walker say, "Keep it up all night. We have got more people coming." (R. 2143)

Then, after an interval of about five to ten minutes, General Walker stepped off at a steady pace in the direction of the Lyceum. (R. 2144-2145) He was accompanied by a heavy-set man weighing at least 250 pounds. (R. 2145) The crowd fell in behind General Walker. (R. 2144-2145) The crowd was throwing rocks, bottles and missiles at the marshals. (R. 2145) The crowd, led by General Walker, continued up to a point about 75 feet from the marshals, where it was dispersed by a heavy barrage of tear gas. (R. 2145) By that time Hill thought he had enough on his tape recorder and left. (R. 2145)

2. General Walker's Speech from the Monument

It is undisputed that, shortly after General Walker's arrival on the campus, the Mississippi Highway Patrol began driving away around University Circle and down University Avenue. (R. 1212, 1863-1865)

The crowd took the departure of the Highway Patrol to mean that Governor Barnett was "selling them out."

(R. 1212, 1995) Louis Leman, a witness for the plaintiff, testified that the reaction of the students was "well, we have really been let down. The Highway Patrol is leaving and the Governor has sold us out." (R. 1212) According to General Walker, the students "hated to see the Highway Patrol leaving." (R. 1995)

General Walker stood on the northeast side of the monument facing east down University Avenue as he addressed the crowd. The bulk of the crowd stood in the street in front of the monument facing west. (R. 955, 1847-1848, 2319, 2486-2487, 2273, 2310) After General Walker began his speech, the size of the crowd increased spontaneously. (R. 1995, 2277) It is undisputed that the crowd was composed of several hundred people. (R. 2118, 2185) General Walker estimated that there were probably 200 people in the crowd. (R. 1995) However, other estimates by his own witnesses show that this is at least a conservative figure. Talmadge Witt estimated there were 400 to 500 people around the monument. (R. 1297) Plaintiff's witness Edmund Jackson estimated there were at least 300 people in the crowd. (R. 1387)

General Walker's speech from the monument was well received by the crowd. According to plaintiff's witness Jackson, "the crowd was as attentive as they could be during a full scale riot." (R. 1387) The crowd was enthusiastic and they would cheer when he made a point. (R. 2118, 2320, 2579) Although there may have been some boos or jeers from the crowd (R. 1165, 2186, 2370), there were a lot of cheers. (R. 2186) As plaintiff's witness Leman put it, the boos were made "kind of humorously or mildly." (R. 1214) There were shouts from the crowd of "Let's go! Let's go!" (R. 2579) and "Let's go, Rebels" (R. 902) and yells of "Lead us, General." (R. 1352, 2371)

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It is undisputed that people in the crowd gathered at the monument had rocks and other missiles in their hands while General Walker was speaking. General Walker admits that a few of the people had rocks in their hands. (R. 1982) According to Talmadge Witt, a lot of the people in the crowd listening to General Walker's speech had bricks, sticks and bottles in their hands which could be plainly seen (R. 1297)

a. Evidence of The Plaintiff

According to General Walker, he told the crowd in his speech at the monument:

> " 'You have a right to protest. You can continue to protest. Violence is not intended. Nobody came to Mississippi for violence. If there is any bloodshed, it is on the hands of the Federal Government. There is a sign on your own airport—and the tragedy of the situation is symbolized by a sign—the truth and the tragedy of the situation is symbolized by the sign on your own airport that says, "Cuba that way." ' "

General Walker testified that at this point he was interrupted by Reverend Duncan Gray. After Deputy Sheriff Talmadge Witt had taken Reverend Gray away from the monument, he resumed his speech:

> " 'I have come from the courthouse within the last hour or two and I will tell you what I heard at the courthouse by a representative of the Governor. I am not telling you this. I am not telling you. I am telling you what I heard and what I was told by a representative at your courthouse down in Oxford this afternoon. He referred to the governor and his desires and wishes and he referred to Birdwell.' "

Realizing that he had used the wrong name, he turned down and asked Leman for the correct name and, having obtained this information, he continued:

> "'The Chief of your Highway Patrol, Birdsong. The Governor's representative said that Birdsong had not followed the wishes and desires of the Governor when he escorted during the afternoon Meredith on the campus. I am not saying this, I am repeating to you what the representative of the governor had stated this afternoon.'" (R. 1996-1998. See also R. 1849-1851)

General Walker denied that he said, "Keep up the protest" (R. 2004), "This is a dangerous situation" (R. 2002), or "Help is on the way" (R. 2007), in his speech on the monument or at any other time during the night. However, Talmadge Witt, a witness for the plaintiff, heard General Walker say in his speech:

> "'You can protest all you like. They may run out of gas. Help is on the way. Thousands are coming.'" (R. 1310-1311; APD-1, p. 3; APD-2, pp. 44-45)

Richard H. Sweat, a witness for the plaintiff, heard General Walker say, "Keep up the protest." (R. 993) Plaintiff's witnesses Jackson and Ray heard the General say, "This is a dangerous situation." (R. 1373, 1508) Jackson also stated that he seemed to recall that General Walker said, "But don't let up now. You may lose this battle but you will have been heard." (R. 1371-1372)

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(b) Evidence of the Defendants

Perhaps the most complete and comprehensive account of what General Walker said during the course of his speech from the monument was presented by John E. King.

John E. King

John E. King, called as a witness for the defendants, testified that he was a graduate of Mississippi State University, and manager of two radio stations, one of which was located at West Point, Miss., the other at Amory, Miss. (R. 2098) In 1962, King, as part of his managerial duties, covered news events of special interest (R. 2100).

King arrived at Oxford at approximately 7 P. M. on September 30 and proceeded to the campus, reaching there about 7:40 (R. 2100-2101). King was there to see what he could see and make a report to his radio stations (R. 2103).

As King approached the Confederate monument, he saw an individual whom he later identified as Reverend Duncan Gray making an appeal to General Walker (R. 2109).

King made notes of General Walker's speech at the monument as it was being made for the purpose of covering the incident as a news story. (R. 2112, 2109) Using his notes to refresh his recollection, King testified that General Walker told the crowd gathered around the monument:

> "'I want to compliment you on your protest. You have a right under the Constitution. I did not come to see violence but any blood you see tonight is on the hands of the federal government and the agencies thereof. I have just been informed by a representa-

> tive of the Governor that the fact these people are on the campus is due to a sell-out. They were given orders that the marshals not be allowed on the campus at the order of certain officials, but were allowed on the campus at the order of a certain official.'" (R. 2113)

At this point, there were cries from the crowd, "Who was this that sold us out?" and General Walker replied, "Birdsong." General Walker then continued:

> "'I am only telling you what has been reported by an official representative of the Governor. Don't expect violence but you can protest until Meredith is not admitted. This is the long route to Cuba.'" (R. 2113)

King testified that about this time Reverend Gray again approached General Walker and said, "General Walker, stop it. You can." General Walker replied that he was sorry he was an Episcopalian. (R. 2113) As Reverend Gray was being escorted out of the area, General Walker resumed his speech saying:

> "'You can continue protesting as you are. There is no stopping point. There are many headed toward Oxford, both Mississippians and non-Mississippians to help you'." (R. 2113-2114)

The notes which King made of the highlights of General Walker's address at the time it was being delivered were introduced in evidence. (APD-37) Two days later, while the events were still fresh in his mind, King wrote a more detailed and elaborate statement of what he heard General Walker say in his speech, which was also admitted in evidence. (APD-38)

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King's account of what was said by General Walker in his speech from the monument is fully supported and corroborated by the testimony of Craig Ellis. (R. 2274-2276) Ellis, too, made notes of the highlighs of General Walker's speech, while he stood listening to the General, which were also introduced in evidence (APD-40)

REVEREND DUNCAN GRAY

Reverend Duncan Gray was called as a witness for the defendants.

In September 1962, he was the rector of St. Peter's Episcopal Church in Oxford. (R. 2446)

On the evening of Sunday, September 30, Reverend Gray, in the company of a member of the faculty of the University of Mississippi, listened to the speech of the President of the United States. (R. 2451) Reverend Gray learned from a television broadcast immediately after the President's speech that violence had broken out on the campus. (R. 2451) Reverend Gray, accompanied by Reverend Wofford Smith, the Episcopalian chaplan of the University, proceeded toward the campus. (R. 2452)

After stopping at the "Y" Building for a short time, Reverend Gray and Reverend Smith proceeded to the Circle where they began to stop students and plead with them to give up their weapons, the bricks or bottles that they were carrying. (R. 2453)

Reverend Gray and Reverend Smith then became separated. Reverend Smith moved into one area and Reverend Gray into another. (R. 2453)

After visiting the "Y" Building a second time, Reverend Gray saw General Walker.

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Reverend Gray approached General Walker and spoke to him, asking him to do what he could to get the students to go back to their dormitories and to stop the rioting that was going on. (R. 2456-2457)

General Walker's response was: "I am here only as an observer. They have every right to protest. I couldn't stop it if I wanted to, but I am here only as an observer." (R. 2457)

Reverend Gray testified that he kept pleading with General Walker, pointing out that he thought General Walker's word would carry a great deal of influence with the students because they did identify him with their cause, he was something of a hero to them. Reverend Gray thought that General Walker could be a real help and effect in getting them to calm down and go back to their dormitories. (R. 2457)

Reverend Gray testified that finally, as he continued to plead with General Walker, General Walker said, "Who are you anyway?" and "what are you doing here?" Reverend Gray told him he was the rector of the local Episcopal church; that this was his home and his town and his community; that he was deeply concerned about what was being done to it, and that his purpose in being there was to do anything he could to put a stop to it or to get as many students to quit and go back to their dormitories as possible. (R. 2457)

After Reverend Gray told General Walker who he was and what he was doing there in response to General Walker's questions, General Walker said, "You're the kind of Episcopal minister that makes me ashamed of being an Episcopalian." (R. 2458)

General Walker conceded that he made the statement quoted to Reverend Gray. (R. 1852-1853)

At this point, General Walker started to move away in the direction of the Confederate monument. (R. 2458)

Reverend Gray then walked back to the "Y" Building. (R. 2458) Just as he arrived at the steps of the "Y" Building, he saw a very large crowd gathering around the monument, and a man who he thought was General Walker standing at a slightly elevated level above the crowd. (R. 2458) The bulk of the crowd was east of the monument. (R. 2458) Reverend Gray then started back to the monument. (R. 2459)

As Reverend Gray approached the edge of the crowd, the first thing he heard General Walker say was, "I want to congratulate you students on what you are doing here this evening." (R. 2459)

As he moved through the crowd toward the monument, Reverend Gray heard General Walker say in substance:

> "Stand firm. You have every right to protest. There are thousands behind you. You will win in the end. This is a long way around to Cuba. The Marshals ought to be in Cuba and not here." (R. 2459)

When he reached the base of the monument, Reverend Gray again pleaded with General Walker to use his influence to get the students to go back to their dormitories and stop the rioting. (R. 2459) In response to the appeal of Reverend Gray, General Walker, for the second time, told the crowd, "Here is an Episcopal minister who makes me ashamed to be an Episcopalian." (R. 2458-2459)

About this time, Reverend Gray was pulled down from the base of the monument. Deputy Sheriff Talmadge Witt, among others, picked Reverend Gray up and escorted him

to the edge of the crowd. (R. 2460-2461) From there Reverend Gray returned to the steps of the "Y" Building. (R. 2461)

When Van Savell, the reporter of The Associated Press, arrived at the monument, General Walker was already speaking. The first word Savell heard General Walker say was "Cuba." (R. 2576) Savell then heard General Walker say, "Somebody has betrayed you." Savell understood General Walker to then add, almost inaudibly, "Barnett, Governor Barnett." General Walker then leaned down and spoke to someone and then said "Birdsong, Birdsong has betrayed you." (R. 2576-2577) Savell then heard General Walker say in substance, "But don't let up now. You may lose this battle but you will have been heard. This is a dangerous situation. You must be prepared for possible death. If you are not, go home." (R. 2578)

For other accounts of General Walker's speech, see R. 2185-2188; R. 2320; R. 2411-2413.

3. General Walker's Movement Toward the Marshals After the Speech from the Monument

It is undisputed that, shortly after concluding his speech from the monument, General Walker moved toward the marshals more than half of the distance from the flagpole to the Lyceum. (R. 1242, 1305-1306, 1867, 1965) Similarly, there is no question but that the crowd which listened to General Walker's speech from the monument was armed with bricks, rocks, bottles and other missiles. (R. 1292, 1982, 2278, 2321-2322, 2348)

As the testimony is conflicting as to some of the circumstances attending the admitted movement by General Walker toward the marshals on this occasion, it will be

necessary to review separately the testimony of the witnesses called by the plaintiff and the defendants.

(a) Evidence of the Plaintiff

According to the testimony of General Walker, he stepped down from the monument after concluding his speech and moved 6 or 8 steps west of the monument and began talking to the students about the Cuban situation. Some of the students wanted to shake hands with him after his speech on the monument and some wanted his autograph. He asked the students a lot of questions about what was happening on the campus and what had happened on the campus before he got there. (R. 1866) After talking to the students for 5 or 10 minutes (R. 1866), General Walker testified that he then moved on toward the flagpole, talking to people all of the time, and, at the same time, watching the Lyceum Building to see what was going on up there and what the marshals were doing. (R. 1867) As he moved about four steps west of the flagpole, in the direction of the Lyceum, a volley of tear gas came which landed near him, and he just walked around on the other side of it and watched what was going on. He stayed up in that area four or five minutes. (R. 1868)

Louis Leman testified that when General Walker stepped down off the monument, he walked to a point slightly north of the monument toward the YMCA Building where he stood for probably 15 minutes just discussing the situation. Then "we walked back up toward the front," (R. 1217) to a point approximately midway between the flagpole and the Lyceum. (R. 1242) They stood there for a while and then the tear gas became heavy and they walked back. (R. 1242)

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Richard H. Sweat, one of plaintiff's witnesses, testified that when General Walker stepped down off the monument from the south side after concluding his speech, he walked over and introduced himself to General Walker. (R. 966, 969) According to Sweat, he and General Walker then walked about 45 or 50 feet south or southwest of the monument to get a "better view of the Lyceum thing" and that about fifteen people followed. (R. 966) Sweat claimed that he and General Walker talked about Cuba and General Walker's program in Germany; they did not even discuss the riot. (R. 969) From that point, according to Sweat, General Walker moved on toward the YMCA Building. (R. 969) Sweat lost sight of General Walker at this time and did not see him again. (R. 969)

Here again, the accounts of the incident under consideration, as given by General Walker, Louis Leman and Richard H. Sweat, are in sharp contrast with the accounts given by the plaintiff's witnesses, Talmadge Witt and Danny Hunter.

In September 1962, Witt was then 42 years of age and a Deputy Sheriff of Pontotoc County, Mississippi. (R. 1253) He was one of a number of peace officers of the State of Mississippi who were sent to Oxford at the direction of Lieutenant Governor Johnson (R. 1254) and Governor Barnett (R. 1255). On Sunday, September 30, Witt, who had been at Oxford four or five days during the preceding week, was told to return. (R. 1255) Witt arrived on the campus about 4:30 that afternoon. (R. 1256)

It is undisputed that Witt saw General Walker when he arrived on the campus at approximately 8:45 P. M. and that he remained with General Walker throughout the evening until he left the campus about midnight. Witt testified that

he was no more than five steps from General Walker all night. (R. 1263)

Prior to the trial of this action—on November 25, 1963—Witt signed a written statement setting forth what he did, what he saw and what he heard on the campus on the evening of September 30, 1962. The statement, which is set forth in full in the Appendix to this brief (pp. 14-20), reads in part as follows:

> "After some in the crowd had asked Walker if he would lead them, he stepped down from the side of the monument and said: 'Keep protesting and see if we can get closer.' He then started toward the marshals and the crowd of at least 1,000 by that time, followed him. This crowd was armed with sticks, rocks, coca cola bottles and other things, as I have heretofore stated. They seemed to have anything that they could get their hands on, and when they got close enough, they would throw towards the marshals. When the front of this crowd, which General Walker was with, got in about 200 feet of the marshals, they fired another blast of tear gas, and the crowd ran back, with General Walker with them." (APD-1, p. 3)

Upon the trial, Witt reaffirmed what he said in the statement except insofar as it stated that 1,000 people followed General Walker as he moved toward the marshals. Witt explained that he meant there were 1,000 people in that area. (R. 1281-1282)

Plaintiff's witness, Danny Hunter, testified that there were approximately 200 people gathered at the monument while General Walker was making his speech. (R. 1655,

1658) According to Hunter, General Walker stepped down from the monument and, after talking to a few people there, he said, "Come on. Let's go,"[11] or something to that effect. (R. 1658) General Walker then started walking west toward the Lyceum Building, and, as he walked forward, a majority of the crowd that had listened to his speech fell in behind him or around him (R. 1657-1658) Hunter himself followed General Walker to a point about halfway between the monument and the flagpole. (R. 1659) When General Walker first started toward the Lyceum, Hunter was 8 to 10 feet behind him and later General Walker was 20 to 25 feet ahead of him. (R. 1659) The last time Hunter saw General Walker was after some tear gas had been fired and Hunter had run back toward the monument a little. At that time, Hunter saw General Walker in the vicinity of the flagpole, and, according to Hunter, General Walker could have been past the flagpole toward the Lyceum Building. (R. 1657)

(b) Evidence of the Defendants

The testimony of the witnesses called by the defendants is that, shortly after General Walker stepped down from the monument following the conclusion of his speech and as he began moving westward toward the Lyceum, the crowd which had gathered at the monument fell in behind and followed him past the north-south crosswalk and the flagpole; that, after the crowd, with General Walker at the forefront, had passed the north-south crosswalk, rocks, bricks and other missiles were hurled at the marshals and that tear gas was then fired, dispersing the crowd. (R.

[11] Sidney Holmes, another witness who testified on behalf of General Walker, also heard a similar remark. (R. 1424)

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2276-2280, 2370-2373, 2321-2323, 2348-2349, 2391-2393, 2413-2415)

CRAIG ELLIS

Craig Ellis, a reporter for the Nashville Banner who was on the campus on the evening of September 30, saw General Walker addressing a crowd assembled around the Confederate statue. (R. 2271-2272) Ellis joined the group, and made notes of the highlights of General Walker's speech which he produced upon the trial. (R. 2273-2274) Ellis ran out of paper but found room for a short note that he took after General Walker left the statue and started toward the Lyceum Building. The note that he made was: "General Walker led forces up across campus." (R. 2276)

Ellis testified that General Walker stood on the monument for a brief period of time after completing his speech. As he stepped down from the monument; General Walker turned left, bringing his arm upward in a sweeping motion in the direction of the Lyceum and then walked by himself for a short distance toward the Lyceum. At that point two men on the edge of the crowd caught up with General Walker and after they had taken a few more steps together the crowd surged forward behind General Walker and the two men accompanying him. (R. 2277-2278)

The crowd was behind the three men for a short period and then came up alongside the three men until it was just a solid wall, a solid line, from one side of the campus to the other. (R. 2278) Ellis estimated that there were between 800 and a thousand people around or alongside General Walker as he proceeded toward the Lyceum. (R. 2278) As the crowd left the area of the monument, Ellis saw several people holding rocks, pieces of concrete and other missiles in their hands. (R. 2278) The crowd was yelling and shouting as it moved westward. (R. 2279)

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From his position near the monument, Ellis watched the crowd as it moved past the flagpole continuing toward the Lyceum. (R. 2280) Tear gas was fired just after the crowd had passed the flagpole, obstructing Ellis' vision. (R. 2280)

Travis Buckley

In September, 1962, Buckley, now a member of the bar of the State of Mississippi, was a senior in the Law School of the University of Mississippi. (R. 2364, 2366)

Buckley arrived on the campus shortly after 8 P. M. on September 30. (R. 2366) He saw General Walker in the vicinity of the Confederate monument. He heard people in a group around General Walker say, "Speak to us." (R. 2369), in response to which General Walker mounted the base of the Confederate monument and delivered a speech. (R. 2369) Buckley heard the speech. (R. 2369-2370)

The crowd began to yell, "Be our leader." General Walker said, "All right. All right. I will." (R. 2371)

General Walker began to walk toward the marshals and the crowd began to follow him in that direction. (R. 2371) Buckley estimated that there were 300 to 500 people in the crowd that responded to the movement of General Walker. (R. 2371) General Walker was in front of them at all or nearly all times. (R. 2371) There were some running ahead of General Walker with rocks in their hands. They would throw them and then come back. (R. 2371)

William Brittingham

William Brittingham, who was a student at the University of Mississippi, also witnessed the incident under consideration. (R. 2321)

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Brittingham saw General Walker step down off the east side of the monument, turn north and then move westward toward the Lyceum. As he did, the crowd which had gathered around the monument and listened to the speech, followed behind General Walker. (R. 2321) The crowd was armed with bricks, broken bottles, rocks and other missiles. (R. 2321-2322) Brittingham followed the crowd as it moved toward the Lyceum. After the crowd had passed the north-south crosswalk in the Circle, tear gas was fired and the crowd dispersed. (R. 2323)

The testimony of Michael Smith (R. 2348-2350) and James Kingsley (R. 2391-2393) substantiates the accounts of the incident as described by Ellis, Buckley and Brittingham, in every material respect.

The incident was also witnessed by Donald J. Proehl while he was standing on the steps in front of the YMCA Building. (R. 2413-2414) Proehl had been at the monument and had heard part of General Walker's speech. (R. 2411, 2413) When Reverend Duncan Gray was pulled down from the monument, Proehl assisted Deputy Sheriff Witt in picking him up. From there Proehl accompanied Reverend Gray back up to the YMCA. (R. 2413) When he reached the front of the YMCA Building, Proehl saw a large crowd, which he estimated to contain some 400 people, moving toward the Lyceum, with a tall gentleman wearing a white Texas hat right up at the front. (R. 2413-2414) Shouting and yelling, the crowd advanced past the flagpole before tear gas was fired. (R. 2414). Although Proehl could not see what the crowd was throwing, he could see the arms of people in the crowd moving as if they were throwing something. (R. 2414).

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SUMMARY

As General Walker tells it, he was on the campus from 8:45 P.M. to 1:30 A.M. but couldn't think of anything significant happening most of the time. (R. 1874, 1920-1921, 1993-1994, 2009)

The incontestable fact is that when General Walker arrived on the campus about 8:45 P. M. (R. 1245, 1260, 2389), a full-scale riot had developed which was to continue all night and result in the death of two persons (R. 999, 1333), injury to fifty (R. 999, 2063-2064), the destruction of 16 automobiles (R. 1269) and the arrest of approximately 160 persons. (R. 2063-2064)

General Walker would have us believe that he remained on the campus for nearly five hours merely in the role of an observer. (R. 1866, 1991, 2009) In this he is not supported by his witnesses.

The plaintiff's witnesses testified that when General Walker arrived on the campus, a rioting crowd hailed him as its leader (R. 1276, 1317, 1333, 1980)

General Walker made a speech to the crowd from the front of the Confederate monument on the campus. (R. 1865)

Whether we take the account of the speech given by the plaintiff's or the defendants' witnesses, the speech was one that was calculated to incite the crowd to continue the rioting.

Talmadge Witt, a witness for the plaintiff, heard General Walker say in his speech: "You can protest all you like. They may run out of gas. Help is on the way. Thousands are coming." (R. 1310-11, APD-1, p. 3, APD-2, pp. 44-45)

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Richard H. Sweat, a student who was a witness for the plaintiff, heard General Walker say, "Keep up the protest." (R. 993) The plaintiff's witnesses, Edmund Jackson and Charles Ray, heard General Walker say, "This is a dangerous situation." (R. 1373, 1508) Jackson also testified that he seemed to recall that General Walker said, "But don't let up now. You may lose this battle but you will have been heard." (R. 1371-1372)

John E. King, a witness for the defendants, testified from his notes made at the time that General Walker said, among other things, "I want to compliment you on your protest. You have a right under the Constitution." (R. 2113)

King also testified that General Walker said, among other things, "You can continue protesting as you are. There is no stopping point. There are many headed toward Oxford, both Mississippians and non-Mississippians, to help you." (R. 2113-2114)

An Episcopal minister, Reverend Duncan Gray, a witness for the defendants, testified that he pleaded with General Walker to use his influence and prestige with the students to persuade them to stop the rioting and to return to their dormitories. (R. 2456-2457) General Walker's response was that the Reverend Gray was the kind of Episcopal minister that made General Walker ashamed of being an Episcopalian. (R. 2458)

Whether we take the evidence of the plaintiff or the defendants, there can be no doubt that General Walker led the rioters as they charged toward the Marshals.

Talmadge Witt testified for the plaintiff that after some in the crowd had asked General Walker if he would lead

them, he stepped down from the side of the monument and said, "Keep protesting and see if we can get closer." General Walker then started toward the Marshals and the crowd which he estimated to consist of from fifty to a hundred people (R. 1271) followed him, armed with sticks, rocks, coca-cola bottles and other things. They seemed to have anything that they could get their hands on. When they got close enough they would throw toward the Marshals. When the front of this crowd that General Walker was with got within about 200 feet of the Marshals, they fired another blast of tear gas and the crowd ran back, General Walker with them. (R. 1287)

Danny Hunter, a witness for the plaintiff, testified that General Walker said, "Come on. Let's go," or something to that effect, after stepping down from the monument. (R. 1658) General Walker then started walking toward the Lyceum Building. As he walked forward, a majority of the crowd that had listened to his speech fell in behind him and around him. (R. 1657-1658)

The account of Tom Gregory, a witness for the defendants, stands inflexible as it was published in The Meridian Star the next day. In this account, Gregory said, among other things, "Walker, wearing a Texas hat and a dark blue suit, walked toward the Lyceum, with perhaps 200 men following him. About 50 yards from the federal line, tear gas bombs began falling around the group. General Edwin Walker (retired), who wouldn't retreat, did." In this account, Gregory also stated, "The former Army officer was just one of the number of outsiders — how many will probably never be known — who egged and aided a hard core of Ole Miss students into a rockflinging destructive riot." (APD-39, Appendix, pp. 9-10)

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Gregory's account is fully corroborated by the defendants' witness, John Charles Hill. He testified that about five to ten minutes after he first saw General Walker at the monument, General Walker stepped off at a steady pace in the direction of the Lyceum. (R. 2144-2145) The crowd fell in behind him. (R. 2145) The crowd led by General Walker continued up to a point about 75 feet from the Marshals where it was dispersed by a heavy barrage of tear gas. (R. 2145)

Craig Ellis, a witness for the defendants, who was taking notes of Walker's speech at the monument, made a note after General Walker left the statue and started toward the Lyceum Building, which was, "General Walker led forces up across campus." (R. 2276)

In statements from his home in Dallas and upon his arrival in Mississippi, General Walker said, among other things, "It's time to move" — "Now is the time to be heard" — "I call for a national protest against the conspiracy from within." (APD 8, 19, 21)

The evidence in this case established beyond any doubt that General Walker never deviated from his stated objectives.

Measured by any standard, the overwhelming evidence on the trial of this action conclusively established that the publications complained of were and are true in substance and in fact.

The record in this action is so lacking in evidentiary support for the verdict of the jury that the publications complained of were false that the judgment rendered in the District Court constitutes a denial of due process in violation of the Fourteenth Amendment to the Constitution of the United States.

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ASSIGNMENT OF ERROR NO. 2

The judgment of the District Court is manifestly erroneous because the publications complained of were and are fair comment published without malice relative to a matter of public interest and concern and are, therefore, privileged under the law of Louisiana.

In September 1962, General Walker injected himself into the vortex of a discussion of a matter of public concern.

The matter of public concern was the enforcement of the mandate of the courts of the United States directing that James H. Meredith be admitted to the University of Mississippi as a student.

General Walker was not a resident of Mississippi. He had no connection with the University of Mississippi.

Neither Governor Barnett nor anyone else asked him to come to Mississippi. (R. 1930)

Nevertheless, he made a public appeal for ten thousand strong to stand by Governor Barnett at Jackson, Mississippi. He asked them to come and bring their flags, their tents and their skillets. He called for a national protest against what he described as a conspiracy from within. He called for a rally to the cause of freedom. (APD-8)

General Walker's conduct and speech in his efforts to forestall the enforcement of the mandate of the courts of the United States was a subject of fair comment.

Fair comment with respect to matters of public concern published without malice is privileged under Louisiana law.

State v. Webster, 245 La. 523, 159 So. 2d (1963).

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Kennedy v. *Item Co.*, 213 La. 347, 34 So. 2d 886 (1948)

Kennedy v. *Item Co.*, 197 La. 1050, 3 So. 2d 175 (1941)

Addington v. *Times Pub. Co.*, 138 La. 731, 70 So. 784 (1916)

Flanagan v. *Nicholson Pub. Co.*, 137 La. 588, 68 So. 964 (1915)

Rabb v. *Trevelyan*, 122 La. 174, 47 So. 455 (1908)

In *Kennedy* v. *Item Co.*, 213 La. 347, 34 So. 2d 886 (1948), in stating the general principles of fair comment as recognized by American and English authorities, the Supreme Court of Louisiana said, at page 892:

> " 'Every person has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose. Such comments are not libelous, however severe in their terms, unless they were written intemperately and maliciously.' "

General Walker was a person of public prominence. Subsequent to his resignation from the Army in November 1961, he became a professional critic and advocate of his political views through his writings and speaking engagements. (R. 1794, 1899)

In the spring of 1962, General Walker announced his candidacy for the office of Governor of the State of Texas. (R. 1899)

When General Walker arrived on the campus on Sunday, September 30, the rioting crowd welcomed him as their leader. He made a speech. He remained on the campus for nearly five hours. (R. 1874)

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It is obvious that the statement that described General Walker's movements as a charge and the statement which reported that he was in complete command of the crowd were well within the area of fair comment and, therefore, privileged.

There was no evidence of any kind or nature on the trial of this action which indicated that the publications complained of were made with actual malice.

ASSIGNMENT OF ERROR NO. 3

The defendants were denied the right to due process of law and the right to a fair and impartial trial in the District Court, as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The judgment for $2,250,000 damages rendered against the defendants in the District Court constitutes a denial of due process in violation of the Fourteenth Amendment to the Constitution of the United States, which provides, inter alia, that no state shall deprive a person of his life, liberty or property without due process of law.

In a pre-trial proceeding in this action held on October 23, 1964, the District Court limited the issues in this action to a cause of action for damages based upon the publication by the defendant, The Times-Picayune Publishing Corporation, of news dispatches of the defendant, The Associated Press, in the newspapers, The Times-Picayune and The New Orleans States-Item.

The pre-trial order of the District Court, insofar as it is pertinent, reads as follows:

> "That the cause of action asserted by the plaintiff against defendants, THE ASSOCIATED PRESS and THE TIMES-PICAYUNE PUBLISHING CORPORATION, is and shall be limited on trial

> of this case to the cause of action which is asserted jointly against said defendants based soely upon publication by The Times-Picayune Publishing Corporation in its newspapers, The Times-Picayune and The New Orleans States-Item, of news reports furnished to said corporation by The Associated Press concerning plaintiff." (R. 260)

Notwithstanding the order of the District Court, Clyde J. Watts, counsel for the plaintiff, in his closing statement to the jury, demanded damages of $1,000 for each of 1,250 newspapers that are members of The Associated Press, or a total of $1,250,000. The statement made to the jury by Watts was as follows:

> "Now, what is it worth? There are 1250 member papers of the Associated Press. Those people need a lesson. You have got to teach them, . . . A thousand dollars apiece for all these news media, for all the newspapers, would let the radios off free, would let the televisions off free, and it would let the foreign newspapers off free, and it would be just a fraction of the dollars they brought in for this sensational and phony story concerning General Walker. . . . Anything less than $1,250,000 is absolutely inadequate contribution to General Walker and is no retribution to the malicious, vicious, vile creation by the Associated Press of a false public image of a man as I said whose concepts of duty, honor, country reach a sublime plane of unselfishness." (R. 383-384)

There is no evidence in this case that 1250 newspapers published the news dispatches upon which this action is based.

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No evidence was offered upon the trial of this action to show that 1250 newspapers published the news dispatches upon which this action is based.

The fact is that 1250 newspapers did not publish the news dispatches upon which this action is based.

At the conclusion of Watts' closing statement, counsel for the defendant, The Associated Press asked the court to charge the jury (R. 2754-2755):

> "MR. GUYTON: I would like to have this incorporated into the record, Your Honor." (Reading statement to the Court) "Your Honor has indicated that he does not wish to hear oral exceptions to the charge which is to be given to the jury, and we will file written exceptions thereto. One of these exceptions deals with Your Honor's failure to charge the jury regarding the limitation of this case to the news dispatches, upon which this action is based, that were transmitted by The Associated Press to The Times-Picayune Publishing Corporation, and published in its two newspapers, The Times-Picayune and The New Orleans States-Item. Counsel for the plaintiff has now, in oral argument, asked the jury to bring in a verdict based upon an assessment of $1,000.00 against each of the 1250 newspaper members of The Associated Press. We, therefore, in view of this argument, urge Your Honor to charge the jury that a verdict for the plaintiff, against these defendants, shall be restricted to the damage, if any, occasioned by the publication of the news dispatches in The Times-Picayune and The New Orleans States-Item. There is no evidence in this case that the news dispatches on which this action is based were published in 1250 papers.

"Further, in view of Your Honor's failure to charge the jury that punitive damages may not be awarded and in view of the argument of plaintiff's counsel that defendants 'need a lesson' and in effect that retribution should be visited on defendants, we ask that this jury be charged on the law as to punitive damages."

The District Court refused to give the instructions requested by the defendant, The Associated Press, and it duly excepted. (R. 392-393)

The defendants had no opportunity to challenge Watts' statement that 1250 newspapers published the news dispatches upon which the action is based.

The first of two concluding statements to the jury on behalf of the plaintiff was made by Scott Wilkinson. (R. 353-361) Earl Thomas and Ashton Phelps then made closing statements to the jury on behalf of the defendants, The Associated Press and The Times-Picayune Publishing Corporation. They were followed by Clyde J. Watts.

Watts' statement having gone unchallenged, there can be no doubt that the jury understood that they were to award damages based upon the publication of the news dispatches in 1250 newspapers.

A judgment of a State Court that is not supported by any evidence upon the trial violates due process under the Fourteenth Amendment.

Due process of law requires that the verdict of the jury and the judgment rendered be based upon the evidence developed on the trial.

Turner v. *Louisiana*, 379 U. S. 472, 85 S. Ct. 546 (1965)

Garner v. *Louisiana*, 368 U. S. 157, 82 S. Ct. 248 (1961)

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Thompson v. City of Louisville, 362 U. S. 199, 80 S. Ct. 624 (1960)
In re Murchison, 349 U. S. 133, 75 S. Ct. 623 (1955)

In *Turner v. Louisiana*, 85 S. Ct. 546 (1965), the Supreme Court of the United States said, in an opinion per Mr. Justice Stewart, at page 549:

> "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. 'The jury is an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law.' Sinclair v. United States, 279 U. S. 749, 765, 49 S. Ct. 471, 476, 73 L. Ed. 938."

The basic elements of due process extend to the beginning, intermediate and all steps of a trial.

Morgan v. United States, 304 U. S. 1, 58 S. Ct. 773 (1938)

In his inflammatory address to the jury, Watts asked the jury to award damages of $1,250,000 against the defendants because "Those people need a lesson. You have got to teach them." (R. 383)

Watts also said:

> ". . . Anything less than $1,250,000 is absolutely inadequate contribution to General Walker and is no retribution to the malicious, vicious, vile creation

by the Associated Press of a false public image of a man as I said whose concepts of duty, honor, country reach a sublime plane of unselfishness." (R. 384)

Watts sought and the jury rendered a punitive verdict. The law of Louisiana prohibits an award of punitive damages in civil actions, including an action for libel.

Brian v. *Harper*, 144 La. 585, 80 So. 885 (1919)
Spearman v. *Toye Bros. Auto & Taxicab Co.*, 164 La. 677, 114 So. 591 (1927)
Vincent v. *Morgan's Louisiana and T. R. & S. S. Co.*, 140 La. 1027, 74 So. 541 (1917)

Before Watts made his closing statement to the jury, the defendant, The Associated Press, requested the District Court to specially instruct the jury that the plaintiff's right to recover damages in this action, if any, was limited to such damage as he might have sustained by reason of the publication of the news dispatches of The Associated Press in the newspapers, The Times-Picayune and The New Orleans States-Item (R. 340), and to further instruct the jury that it could not award punitive damages to the plaintiff. (R. 341) The District Court did not do so.

Upon the conclusion of Watts' statement to the jury, the defendant, The Associated Press, specifically renewed its request for these special instructions. (R. 2754-2755) The District Court again refused to give the instruction requested and the defendant, The Associated Press, duly expected. (R. 392-393)

Watts made an extended statement to the jury concerning the political concepts of General Walker and his efforts to save "our country and mankind" from destruction and communism. (R. 363-364, 367-368, 384)

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Watts said that after "the debacle in Germany" General Walker had been "smeared by the left-wing liberal press in the most ruthless, carefully contrived wave of propaganda that I have ever seen." (R. 363-364)

Watts also told the jury (R. 366):

> "... the issues in this lawsuit are bigger than we are, bigger than General Walker, bigger than the Associated Press. Involved is the survival of the United States of America itself in this conflict with an all-powerful enemy."

General Walker's political concepts were irrelevant to the issues in this action.

There was no evidence in this case to support Watt's statement to the jury that after "the debacle in Germany" General Walker had been "smeared by the left-wing liberal press in the most ruthless, carefully contrived wave of propaganda that I have ever seen." (R. 363-364)

The defendants in this action had no responsibilty for what "the left-wing liberal press" said or did.

In what was an obvious appeal to racial prejudice, Watts said (R. 381):

> "... Reverend Martin Luther King can do no wrong and Major General Edwin A. Walker can do no right. That is the overwhelming, frustrating force that we are fighting in this lawsuit. And the outcome of it will depend on how you gentlemen handle it."

Counsel for the defendant, The Associated Press, who had the right to and did present its defense to the plaintiff's claim of libel, was smeared and charged with misconduct.

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Watts told the jury that Earl Thomas, trial counsel for The Associated Press, knew that the statements alleged to be libelous in this action were false. Watts said:

> "... Did Walker assume command and lead a charge ... You know he didn't. I know he didn't. Mr. Thomas knows he didn't." (R. 373)
>
> "... It is false. It is as phony as a three dollar bill and Earl Thomas knows it is false." (R. 378)

Counsel for plaintiff had previously stated to the jury:

> "... the multitude of counsel of the Associated Press in all of their combined and composite wisdom have fabricated the strategy of their case." (R. 362)

The unwarranted attack on counsel for the defendant, The Associated Press, was highly improper and prejudicial.

In *Birmingham Ry. Light & Power Co.* v. *Drennen*, 175 Ala. 338, 57 So. 876 (1912), it appeared that in his closing argument to the jury the attorney for the plaintiff said:

> "I know Hugh Morrow (attorney for defendant) and I know what I am going to tell you about him is true. I know that if he was on the jury trying this case that he would render a verdict in favor of the plaintiff in a large amount."

The Court said, at page 880:

> "... This was clearly and wholly illegitimate argument. It was matter stated as a fact to the jury, of which there was no evidence, and of which fact evidence would not have been admissible, if offered. Its only tendency and effect was to prejudice the jury

against the defense of the defendant, and against the sincerity of its counsel in so defending. Its natural tendency was to persuade the jury to render a verdict for plaintiff, because it was practically confessed by the attorney for defendant. It would be difficult to conceive of argument more objectionable, unfair, and prejudicial than was this, coming, as it did, in the closing argument, to which the defendant's counsel has no opportunity to reply. Courts should not allow verdicts obtained by such argument to stand. . . ."

In concluding his address to the jury, Watts importuned it to provide financial support to General Walker to promote his political concepts and philosophy. Watts said:

". . . with the fate of the whole world and particularly with the destiny of General Walker in your hands I might say that every dollar that goes into this verdict will go back into the cause of freedom." (R. 384)

The appeal for funds to promote the "cause of freedom," i.e., General Walker's political concepts and philosophy, was wholly improper and highly prejudicial.

In *Crowell-Collier Pub. Co.* v. *Caldwell*, 170 F. 2d 941, 945 (5th Cir. 1948), Judge Hutcheson, for the court, in a libel suit, held: "All reference to the plaintiff's proposal to donate to the Negro college the avails of his suit should be rigorously excluded."

In *Holman Live Stock Co.* v. *Louisville & N. R. Co.*, 81 Fla. 194, 87 So. 750 (1921), the Supreme Court of Florida said, at pages 751-752:

"The question of who are parties to an action, or to whom the fruits of their verdict in plaintiff's

favor may accrue, is not a question for the consideration of the jury. Those are matters with which they have nothing to do."

Upon the trial of this action, the defendants were deprived of every right guaranteed to a litigant by the Constitution of the United States and the laws of the State of Louisiana. As a result of all this, the jury returned a verdict against the defendants for $3,000,000. The verdict rendered was three-quarters of a million dollars in excess of the amount demanded in the plaintiff's amended petition.

Upon return of the verdict, both defendants moved for a mistrial. (R. 2756)

The District Court arbitrarily reduced the verdict to the amount demanded in the petition, i.e., $2,250,000. Judgment was rendered accordingly.

There was no evidence in this case of damage to General Walker which would sustain the judgment rendered.

General Walker did not prove or even attempt to prove that he has sustained any pecuniary or special damage by reason of the publications complained of in this action. In fact, the evidence showed that General Walker's income in 1963—after publication of the alleged libelous statements—was at least as much, if not more, than his income in the year 1962, before the publications complained of were made. (R. 1902-1903) Between February 27, 1963, and April 3, 1963, General Walker accompanied Dr. Billy James Hargis on a coast to coast speaking tour known as "Operation Midnight Ride," during which he made some 30 speeches in major cities throughout the United States. (R. 2024; APD-26) General Walker testified that he received $500.00 for each speech, or a total of approximately $15,000.00, over and above his expenses. (R. 2024-2025)

There was no evidence that General Walker's reputation had been damaged by reason of the publications complained of in this action. The only evidence of damage in this case is General Walker's own testimony that he felt humiliated and embarrassed. (R. 1882-1890) In this connection, General Walker admitted that he had made a number of appearances and speeches in Louisiana and other places since the incident at the University of Mississippi, at which he received "quite a few" standing ovations. (R. 2017) More specifically, General Walker admitted that he received a standing ovation at a speech he made at the State Capitol in Baton Rouge on July 4, 1965 (R. 2017), which was attended by 4,500-6,500 people (R. 1732), that the City of Alexandria had declared a "General Walker Day" in his honor on the occasion of an appearance which he made there (R. 2018), and that he had made speeches at New Orleans, Shreveport, Monroe, Springhill and, on July 4, 1964. at Calhoun (R. 2018). General Walker's speech at Calhoun was attended by some 2,000 people (R. 1731) and his speech at Monroe was attended by aproximately 1,000 people. (R. 1730) In addition, General Walker visited the Louisiana Senate on May 27, 1963, where he was applauded by the Senators. (R. 2707; TPD-No. 15A)

Under the circumstances, the only possible basis for recovery would be General Walker's mental anguish, pain and suffering and any damage which might be presumed to have resulted to his reputation by reason of the publications of which complaint is made.

We submit that measured by any standard, a jury verdict for $3,000,000 is so grossly and flagrantly excessive as to shock the conscience of any court and leave no doubt that the jury was actuated by passion and prejudice.

Appendix C

Nowhere in the annals of American jurisprudence has any court upheld an award for damages in an action for libel anywhere near the magnitude of the verdict rendered by the jury in this case or the judgment entered by the District Court on that verdict.

There is set forth in the Appendix to this brief a Table of Awards made by Louisiana courts in actions for defamation which we believe includes every Louisiana case in which an award for damages has been made in an action for defamation. As will appear from this table, the highest award for damages ever upheld by the Louisiana courts in an action for defamation is $9,500.00.

Since the defendants were denied due process of law in the District Court, the verdict and the judgment of the District Court, entered thereon must be reviewed by this Court without regard to the manifest error rule. The verdict of the jury and the judgment of the District Court entered thereon can be given no weight in this Court.

ASSIGNMENT OF ERROR NO. 4

The judgment of the District Court is manifestly erroneous because the alleged libelous publications made, as they were, without malice and relating, as they did, to the public speech and conduct of the plaintiff, a person of admitted public prominence, who deliberately thrust himself into an area in which matters of profound significance and pressing public concern were at issue, are protected from the claim of libel by the First Amendment to the Constitution of the United States, which the Fourteenth Amendment made applicable to the States.

In a series of public statements, General Walker appealed to the people of the United States to rise and stand by Governor Barnett. The people of the United States

who were solicited to help defy a court mandate were told that the Supreme Court of the United States consisted of anti-Christ conspirators who had betrayed the nation. (APD-8, 19, 20, 21, 22)

In making these statements, which bordered on insurrection, General Walker was exercising the right of free speech guaranteed by the First Amendment.

A judgment for $2,250,000 has been rendered against these defendants who, in the exercise of free speech and freedom of the press under the First Amendment, which the Fourteenth Amendment made applicable to the states, reported and described the conduct and speech of General Walker in furthering the cause which he publicly espoused.

The news reports on which this action is based were published without malice concerning the public activities of a former general officer of the United States Army, a recent candidate for the Governorship of Texas and a person of admitted "political prominence" in connection with events of profound significance and great public interest, namely, the confrontation between Federal and State power which occurred in connection with the attempt by James H. Meredith to obtain admission to the University of Mississippi, and the riot that took place on the campus of the University as a part of the confrontation on September 30, 1962.

In two decisions rendered in the last two years, the Supreme Court of the United States had occasion to consider the protection afforded by the Constitution to freedom of expression against actions for defamation.

New York Times v. *Sullivan*, 376 U. S. 254, 84 S. Ct. 710 (1964)

Garrison v. *Louisiana*, 379 U. S. 64, 85 S. Ct. 209 (1964).

Appendix C

The thrust of *New York Times* is that when the interest in a matter of public discussion is as strong as it was in the present action, the Constitution limits the power of a state to award damages in a civil action for defamation or to impose sanctions by prosecution for criminal defamation.

In *Garrison* v. *Louisiana*, which involved a criminal proceeding for defamation, the Supreme Court said (379 U. S. 74, 85 S. Ct. at p. 216):

> ". . . Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And since '* * * erroneous statement is inevitable in free debate, and * * * it must be protected if the freedoms of expression are to have the "breathing space" that they "need * * * to survive".* * * *,' 376 U. S., at 271-272, 84 St. Ct. at 721; only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self government. . . ."

The actual holding in *Times* and *Garrison* applied, of course, to public officials because the persons alleged to have been libeled in those cases were public officials. It is manifest, however, from the reasoning underlying these decisions that they cannot be so limited.

The touchstone of *New York Times* is, first, a strong interest in debate on public issues and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of these issues.

Appendix C

When interest in public issues is particularly strong, the Constitution limits the remedies afforded by the law of defamation.

Rosenblatt v. *Baer*, U. S. , 86 St. Ct. 669, 34 LW 4111 (1966)

In his address—The Supreme Court and the Meiklejohn Interpretation of the First Amendment—Mr. Justice William J. Brennan, Jr., who wrote the majority opinion in the *Times* and *Garrison* cases, said:

> "Of course, only time and more decisions, many more, can reveal the significance of New York Times and Garrison in the evolution of the First Amendment theory."

Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harvard L. Rev. 1, 19 (1965)

General Walker's declared purpose on the night of the riot—September 30, 1962—was to stand shoulder to shoulder with Governor Barnett in opposing the mandate of the courts of the United States. He was in Oxford to support the Governor's position. He occupied the same position from the standpoint of the law of defamation as Governor Barnett, whose cause he was publicly supporting.

It would be a constitutional anomaly without basis in reason to hold on one hand that Governor Barnett was within the *Times* rule, which he clearly was, and to hold on the other hand that those who publicly rose to stand beside him, seeking with equal vigor and effect to rally public support for his cause, were not. Logically, "if the freedoms of expression are to have the 'breathing space' that they 'need * * * * * to survive'" they must extend to

the area of public debate and to all of those who participate in it.

There can be no doubt that the constitutional privilege expounded in *Times* and *Garrison* applies to all matters of great public concern. In the *Times* case, the Supreme Court placed heavy emphasis on the decision of the Kansas Supreme Court in *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908). Referring to "an oft-cited statement of a like rule, which he has been adopted by a number of state courts," *(New York Times v. Sullivan*, 376 U. S. at 280, 84 S. Ct., at 726) the Supreme Court in *Times* quoted from the opinion of Judge Burch in *Coleman v. MacLennan*, 78 Kan. at 723, 98 P. at 285, as follows:

> " 'In such a case the occasion gives rise to a privilege qualified to this extent. Any one claiming to be defamed by the communication must show actual malice, or go remediless. This privilege extends to a great variety of subjects and includes matters of public concern, public men, and candidates for office.' "

Indeed, long before the decision of the Supreme Court in *Times* and *Garrison*, the courts in a number of states had held, under circumstances much less compelling than those present here, that one who had voluntarily thrust himself into a public controversy or matter of great public concern could not recover damages in an action based upon a publication that related to his conduct and activities while in the public arena, in the absence of proof of actual malice.

McLean v. Morrison, 42 S. D. 394, 175 N. W. 878 (1920)

Flanagan v. Nicholson Pub. Co., 137 La. 588, 68 So. 964 (1915).

Appendix C

Since the decision of the Supreme Court in *Times* and *Garrison*, there have been a number of decisions by other courts in which the scope of the constitutional protection afforded by those cases has been considered.

In *Pauling v. News Syndicate Company*, 335 F. 2d 659 (2d Cir. 1964), an action for libel, the Court said, by way of an alternative ground for its decision, that, although the public official presents the strongest case for the constitutional privilege as set forth in the *Times* decision, a candidate for public office would seem to be an inevitable subject for extension, and, once that extension is made, the participant in *public debate* on an issue of *grave public concern* would be next in line.

In considering this question, Judge Friendly said (p. 671):

> "... Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate candidate [sic, in the Brief] for extension; if a newspaper cannot for public office would seem an inevitable [sic, in the Brief] constitutionally be held for defamation when it states without malice, but cannot prove, that an incumbent seeking re-election has accepted a bribe, it seems hard to justify holding it liable for further stating that the bribe was offered by his opponent. Once that extension was made, the participant in public debate on an issue of grave public concern would be next in line; thus, as applied to the case in hand, if a newspaper could not be held for printing Dr. Pauling's charges that a member of the Atomic Energy Commission had made dishonest, untrue and misleading statements to mislead the

> American people' and that a United States Senator is 'the greatest enemy * * * the United States has,' as the New York Times decided, one may wonder whether there would be sound basis for forcing it to risk a jury's determination that it was only engaging in fair criticism rather than misstating facts if it printed, falsely but without malice, that in saying all this Dr. Pauling was following the Communist line."

In *Gilberg* v. *Goffi*, 251 N. Y. S. 2d 823 (1964), the rule in the *Times* case was applied to a mayor's law partner, who was neither an office holder nor a candidate for office. The defendant, a candidate for alderman, had charged a conflict of interest in the practice by the mayor's law firm in the City Court. The mayor's law partner sued for libel on the ground that such a statement was libelous as to him. In holding that the *New York Times* rule was applicable, the Court reasoned that defendant's statement was a part and parcel of a debate on the public issue as to whether the city needed a code of ethics to govern the practice of law in the City Courts by a firm in which a partner held office of mayor.

Similarly, in *Pearson* v. *Fairbanks Publishing Company, Inc.*, (Superior Court of Alaska, 4th District, No. 10,209), an unreported decision, the plaintiff, a nationally known newspaper and radio columnist, sued to recover damages for an alleged libel based on a newspaper editorial in which the plaintiff was characterized as the "Garbage Man of the Fourth Estate." Taking note of the *Times* decision, the Court held that the publication complained of was not actionable, in the absence of a showing of actual malice. In so holding, the Court stated:

"The plaintiff, Drew Pearson, a public figure and internationally known newspaper and radio columnist of no mean proportion should occupy the same standing in the law of libel as Senator Gruening whose cause he was publicly supporting. There can be little question that candidate Gruening could have been so assailed with impunity."

We submit that the *Times* and *Garrison* cases are controlling here. This conclusion is firmly and squarely supported by the recent decision in *Walker* v. *Courier-Journal*, 246 F. Supp. 231 (D. C. W. D. Ky. 1965). The District Court dismissed a complaint in an action for libel brought by General Walker based on publications that are substantially the same as the publications complained of in this action.

In holding that the *Times* case was applicable the District Court said (pp. 233-234):

"The Plaintiff, Walker, is of course not a 'public official' within the commonly accepted meaning of the words. However, he was, as he identifies himself in his own Complaint, a person of 'political prominence.' This Court takes judicial notice that Plaintiff Walker's public life is generally well known to the people of this Nation, that he was the subject of nationwide news reports while on duty as an Army General and also as a candidate for Governor of Texas, and that he has in the past made vigorous public announcements on matters of public concern. Plaintiff was, by his own choosing, present in Oxford, Mississippi, on the occasion of the turmoil after announcing on radio and television his intention to be present there and having called upon

others to join with him there in support of his publicly stated position on the matters of public concern there in issue.

* * *

"I therefore reach the inescapable conclusion that the protective 'public official' doctrine of 'actual malice' announced in New York Times v. Sullivan is in common reason and should be applicable to a 'public man' as well, and that the Plaintiff, Walker, was such a 'public man' under the circumstances involved here. 'Public men are, as it were, public property.'"

The plaintiff cannot recover damages in this action even if the publications complained of were inaccurate or untrue in some respects unless he can prove that the publications were made with actual malice, that is, with knowledge of their falsity or in reckless disregard of the truth. . . ."

In the *Garrison* case, the Supreme Court said:

"Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Under a rule like the Louisiana rule, permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through false-

hood, 'it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded.'" *Garrison* v. *Louisiana*, 379 U. S., at 73, 85 S. Ct., at 215.

In holding the Louisiana Criminal Defamation Statute unconstitutional, the Supreme Court in *Garrison* continued:

"... The New York Times standard forbids the punishment of false statements, unless made with knowledge of their falsity or in reckless disregard of whether they are true or false. But the Louisiana statute punishes false statements without regard to that test if made with ill-will; even if ill-will is not established, a false statement concerning public officials can be punished if not made in the reasonable belief of its truth.

* * *

"... The reasonable-belief standard applied by the trial judge is not the same as the reckless-disregard-of-truth standard. .... The test which we laid down in New York Times is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth." *Garrison* v. *Louisiana*, 379 U. S., at 78-79, 85 S. Ct., at 217-218.

In the present action, the District Court instructed the jury that:

"The publication of a libelous statement with respect to matters of public interest and general concern even though the libelous statement is false is privileged as a matter of law unless the statement

was published with malice. Malice is either ill will or reckless disregard of the truth." (R. 388)

This was not a correct definition of malice within the *Times* and *Garrison* cases.

In *Henry* v. *Collins*, 380 U. S. 356, 85 S. Ct. 992 (1965), the trial court instructed the jury, inter alia, in two separate actions for libel brought by a County Attorney and the Chief of Police, respectively, that:

> "'. . . malice does not necessarily mean hatred or ill will, but that malice may consist merely of culpable recklessness or a wilful and wanton disregard of the rights and interests of the person defamed.'"

The trial court also instructed the jury that it might infer malice from the falsity and libelous nature of the statements in question.

In reversing a judgment for the plaintiff, the Supreme Court held in a *per curiam* opinion that the trial court's instructions on malice did not correctly state the controlling rule of law set forth in the *Times* and *Garrison* cases. The Court said:

> "The jury might well have understood these instructions to allow recovery on a showing of intent to inflict harm, rather than intent to inflict harm through falsehood." *Henry* v. *Collins*, 380 U. S., at 357, 85 S. Ct. at 993.

In the present action, the District Court committed serious and prejudicial error when it instructed the jury, as it did, that "malice is either ill will or a reckless disregard of the truth." (R. 388) The Associated Press duly ex-

cepted to this instruction of the District Court. (R. 391) At the same time, The Associated Press excepted to the failure of the District Court to instruct the jury in accordance with its requested Instructions No. 4(B) and 4(C), which correctly stated the applicable standards. (R. 392-393; R. 339) The District Court erred in failing to instruct the jury as requested.

There is no evidence in this case that the alleged libelous statements were published with actual malice, that is, with knowledge of their falsity or reckless disregard of the truth.

The repressing effect of a $2,250,000 judgment upon freedom of expression is so patent, its inhibiting effect upon the discussion of matters of public concern and debate so plain, and the punishment for the discussion of such matters so oppressive, that this Court may not, consistent with the First and Fourteenth Amendment, permits its imposition.

It follows that the judgment of the District Court should be reversed and set aside and judgment entered for the defendant, The Associated Press, rejecting the demands of the plaintiff.

ASSIGNMENT OF ERROR NO. 5

The judgment of the District Court is manifestly erroneous because there is no evidence that the publications complained of in this action, which are protected by the First and Fourteenth Amendments to the Constitution of the United States, were made with actual malice—that is, with knowledge of their falsity or with reckless disregard of the truth.

Over the objection of the defendants (R. 1126-1128), the plaintiff was permitted to offer in evidence in bulk approximately 55 news dispatches that were furnished by the defendant, The Associated Press, to its members for

publication subsequent to September 30, 1962. (P-3A, P-3E, pp. 2018-2026) For the convenience of the Court, these news dispatches are set forth in the Appendix to this brief at pages 37 through 74.

The plaintiff contended that these news dispatches showed malice on the part of the defendant, The Associated Press, in making the publications complained of in this action.

The plaintiff expressly stated that these dispatches were not claimed to be libelous and were not introduced in evidence to support a claim for damages. The plaintiff stated that the sole purpose of these dispatches was to show malice. (R. 1888, 1637-1639, 1664-1665, 2042)

Nevertheless, after admitting these news dispatches, the Court did not at any time instruct the jury as to the purpose for which they were offered and that they could not be used to support a claim for libel or damage to the plaintiff. (See R. 1637-1639)

No effort was made by the Court to determine the relevancy of each of these news dispatches for the purpose for which it was offered.

These news dispatches all related to events that occurred subsequent to September 30, 1962.

In order that their relevancy on the issue of malice may be determined, it is necessary to review these events in summary.

They are:

> On October 1, 1962, a complaint was filed in the United States District Court for the Northern District of Mississippi by H. M. Ray, U.S. Attorney for the Northern Distrct of Mississippi, charging the plaintiff with violation of Title 18, U.S.C.A. 111, 372, 2383 and 2384. (P-12)

On the same date, October 1, 1962, the plaintiff was taken before United States Commissioner Omar D. Craig at Oxford, Miss. for a preliminary hearing. He waived examination and bail was fixed at $100,000. (P-10)

At or about 6 P.M. on that day, pursuant to orders of James V. Bennett (P-11), United States Director of Prisons, the plaintiff was tranferred to the United States Medical Center at Springfield, Mo.

On October 2, 1962, U.S. Attorney H. M. Ray applied to U.S. District Judge Claude F. Clayton, in the U.S. District Court for the Northern District of Mississippi, for a court order authorizing a psychiatric examination of the plaintiff. In support of this motion, the U.S. Attorney alleged that there was reason to believe that the plaintiff was either insane or incompetent to understand the charges against him and, therefore, unable to aid in his defense. (P-13) The application was supported by an affidavit of Dr. Charles E. Smith, Medical Director and Chief Psychiatrist of the Federal Bureau of Prisons. (P-13) By order dated October 2, 1962, the motion was granted. (P-14)

On October 6, 1962, counsel for the plaintiff filed a motion to vacate the order for the psychiatric examination and for an order directing that the plaintiff be released from detention in the United States Medical Center at Springfield, Mo. upon the execution of a reasonable bail bond. (P-15; P-16, p. 282)

On or about the same date and prior to the hearing of this motion, counsel for the plaintiff, without relinquishing

his right to challenge the validity of the order directing the psychiatric examination of the plaintiff, and the U. S. Attorney stipulated that a psychiatric examination of the plaintiff be made. Acting upon this stipulation, U. S. District Judge Claude F. Clayton ordered that the examination be made by Dr. Robert Stubblefield, Chief Psychiatrist of the Southwest Medical Center, and another psychiatrist engaged in private practice to be named by the United States. (P-16, pp. 282-283)

On the same date, the plaintiff was released from the Springfield Medical Center upon the posting of a bond in the sum of $50,000. (R. 1881; P-16, p. 283)

On October 16, 1962, the plaintiff's counsel filed other motions to vacate the order for a psychiatric examination upon the ground that he had been deprived of his constitutional rights and the privileges accorded to him by law.

On November 20 and 21, 1962, a hearing was held in the U. S. District Court, Northern District of Mississippi, at Oxford, before U. S. District Judge Claude F. Clayton with respect to the various motions made by the plaintiff to challenge the validity of the order directing his psychiatric examination.

In the course of the hearing, it having become apparent to Judge Clayton that the issue in the proceeding was not clearly understood, he made the following statement (P-16, p. 184-185, 186, 288):

> "The Court: You have one basic narrow question . . . with which we are concerned on the merits, not considering the questions of jurisdiction and due process and so forth, and that is the question: Does the United States Attorney have reasonable cause to ask for the man's examination."

Appendix C

At the conclusion of the hearing and on the afternoon of November 21, 1962, Judge Clayton denied the several motions to vacate the order for the psychiatric examination of the plaintiff.

In an oral opinion rendered at that time, Judge Clayton stated (P-16, p. 290):

> "... I now find as fact that reasonable cause does exist for the psychiatric examination contemplated by Section 4244 of Title 18 of the United States Code."

At 4:20 P.M. on November 21, and at the conclusion of the hearing, Judge Clayton retired to his chambers, at which time he requested counsel for the parties to confer with him there. Judge Clayton had before him in a sealed envelope the report of Dr. Stubblefield with respect to the psychiatric examination that had been made of the plaintiff. After a conference with counsel, Judge Clayton returned to the court room, at which time he directed that Dr. Stubblefield's report be made a part of the record in the hearing.

In his report, Dr. Stubblefield stated (P-3A, p. 20; Appendix, p. 56):

> "My purpose was to obtain material which would aid you in your decision about his (Walker's) competence to stand trial in your court. You wanted material in order to deal with three questions: (1) whether or not the defendant (Walker) is presently insane, (2) whether the defendant (Walker) is sufficiently competent to understand the allegations pending against him, as shown by the complaint now pending against him in the Northern District of Mississippi, and (3) whether or not the defendant

(Walker) is competent to properly assist in his own defense."

In directing that the report be made part of the record, Judge Clayton stated (P-16, p. 294):

> "In their presence (counsel for the respective parties) in Chambers the report from Dr. Stubblefield was opened and read, and it was essentially negative; that is to say, there was no opinion expressed in it that Edwin A. Walker is presently insane or presently incompetent within the meaning of Section 4244, Title 18, of United States Code."

On December 1, 1962, counsel for the plaintiff filed a motion for a new trial and to vacate the order of Judge Clayton and the findings of fact and conclusions of law rendered on November 21, 1962, upon the grounds, among others, that the Court erred in holding that the United States Attorney had "reasonable cause" to believe that the defendant (Walker) might be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, and that the Court erred in holding that the constitutional rights of the accused, Edwin A. Walker, were not violated in that he was denied the right of counsel, the right to bail, the right to be personally present and to be confronted with witnesses against him, and to be heard in person and by counsel, and that he had been deprived of his liberty without due process of law. (APD-4)

By order dated December 6, 1962, Judge Clayton (1) sustained the motion of the United States for a psychiatric examination of Edwin A. Walker, (2) denied all motions

made on behalf of the plaintiff to vacate the order for his psychiatric examination upon the ground that his constitutional rights had been violated, and (3) directed that the report of Dr. Robert E. Stubblefield of the psychiatric examination be taken and considered as the report of the psychiatric examination ordered by Judge Clatyon. (APD-5)

No appeal was taken by the plaintiff from the order dated December 6, 1962. All questions concerning the constitutionality and legality of the proceedings against the plaintiff have been finally adjudicated.

On January 21, 1963, a Federal grand jury that had been convened for the purpose of investigating the riot at the University of Mississippi on September 30, 1962, adjourned. No indictment was returned against General Walker. On the same date, the United States Attorney for the Northern District of Mississippi, with leave of court, dismissed the complaint then pending against General Walker "without prejudice" pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure. (APD-42)

Upon the trial of this action, the plaintiff's attorneys contended that the news dispatches that it had offered in evidence were relevant on the question of malice in that they showed (1) that the defendant, The Associated Press, failed to give sufficient publicity to the report of Dr. Robert Stubblefield (R. 2730-2734); (2) that the defendant, The Associated Press, deliberately suppressed and refused to publicize the details of his incarceration and his alleged deprivation of constitutional rights (R. 1523-1543); (3) that it had deliberately misquoted a statement made by U. S. District Judge Claude F. Clayton on November 21, 1962 at the conclusion of the hearing held on that date, thereby slanting the news (R. 2527-2528; 2636-2638) and

(4) that in reporting the action taken by U. S. Attorney H. M. Ray on January 21, 1963, in stating that the dismissal "without prejudice" meant that the charges could be reinstated within five years, The Associated Press slanted the news. (R. 2529-2530; 2648-2649)

These contentions have no basis in fact.

(1)

When the Stubblefield report (P-3A, pp. 20-27; Appendix, pp. 56-62) was made public at Oxford, Miss., late in the afternoon of November 21, 1962, it was transmitted in its entirety by an employee of The Associated Press by means of a so-called B wire or electronic circuit to the news bureau of the defendant, The Associated Press, in New Orleans. (R. 1547, 1588) In the course of this transmission of the Stubblefield report by means of the so-called B wire from Oxford to New Orleans, it became available automatically to members of The Associated Press in Louisiana, Mississippi, Tennessee and Alabama. (R. 1511, 1109-1111) The report was made available to and published in full in the Shreveport Times of November 22, 1962. (APD-3) The Stubblefield report was also transmitted to Texas, as shown by a news dispatch published in The Fort Worth Star Telegram of November 22, 1962. (APD-6)

The Stubblefield report thus became available in its entirety throughout the geographical area in which there was an immediate interest in the judicial proceedings at Oxford.

The substance of the report of the findings of Dr. Stubblefield, which as Judge Clayton stated were negative, was transmitted to the members of The Associated Press throughout the United States. (P-3A, pp. 14, 18, 29-30)

Appendix C

In his report, Dr. Stubblefield cited a report of one of his associates, Irwin J. Knopf, PhD., a diplomate of the American Board of Examiners of Professional Psychology, that General Walker was functioning currently at a superior level of intelligence. (P-3A, p. 21; Appendix, pp. 57-58)

The plaintiff's claim of malice is that when the substance of the Stubblefield report was transmitted to members of The Associated Press outside Louisiana, Mississippi, Tennessee and Alabama, no reference was made in The Associated Press dispatch to the Knopf statement that General Walker was functioning currently at a superior level of intelligence. (R. 2730-2734)

Whether General Walker was functioning currently at a superior level of intelligence was obviously not relevant to the questions that were before Judge Clayton in the proceedings on November 20-21, 1962. At no time did Judge Clayton make reference to the Knopf statement in open court on November 20 or 21. The fact of its omission is obviously not evidence of malice.

(2)

The plaintiff contended that in the news dispatches carried by the defendant, The Associated Press, relating to the proceedings against General Walker, the defendant, The Associated Press, failed to publicize the facts as to Walker's contention that his arrest and detention were in violation of his constitutional rights and the proceedings for a psychiatric examination. (R. 595-615) This contention is without foundation in fact.

The defendants introduced in evidence news dispatches originating at Springfield, Mo. on October 2, 3 and 4, 1962 (P-3b, P-3c, P-3d), which set forth in full press releases and statements for publication made by Walker's counsel

in which they asserted that the proceedings in which he was involved were in violation of his constitutional and legal rights.

On October 16, 1962, the defendant, The Associated Press, made available to its members throughout the United States the full text of the motion to vacate the proceedings before Judge Clayton for a psychiatric examination of General Walker upon the ground that he had been deprived of his constitutional rights and the privileges accorded him by law. (P-3A, p. 1-2)

For ready reference, the news dispatches cited are set forth in the Appendix to this brief, at pages 21 through 36.

(3)

The plaintiff contended that a news dispatch carried by the defendant, The Associated Press, on November 22, 1962, incorrectly reported a statement made by Judge Clayton relative to the Stubblefield report. (R. 2527-2528, 2636-2638)

This contention is frivolous on its face.

The statement of Judge Clayton, as it appears in the transcript of the hearing, was (P-16, p. 294):

> "In their presence in Chambers the report from Dr. Stubblefield was opened and read, and it was essentially negative; that is to say, there was no opinion expressed in it that Walker is presently insane or presently incompetent within the meaning of Section 4244, Title 18, of United States Code."

The news dispatch, in reporting Judge Clayton's comments, said (P-3A, p. 18):

> "The Judge said the examination made by Dr. Robert Stubblefield, Professor at the Southwestern Medical

School in Dallas, 'was essentially negative.' No opinion was expressed. It did not say whether he was sane or insane."

The difference between what Judge Clayton said and what he was reported to have said is wholly insignificant. The substance of the comment attributed to Judge Clayton in the news dispatch is substantially equivalent to what he actually said in open court. This is particularly true in the broader context of the entire dispatch. In the lead paragraph, The Associated Press reported that Judge Clayton had ruled that General Walker was mentally competent to stand trial. (P-3A, pp. 15; 18) That, of course, was the important development in the proceedings. What was said about the Stubblefield report in no way altered that reported fact.

The fact is that the Stubblefield report nowhere states that General Walker is sane or insane, competent or incompetent. (P-3A, pp. 20-27; Appendix, pp. 56-62.) It did provide data from which it could be concluded, as Judge Clayton did, that General Walker was sane and mentally competent."

(4)

In reporting the action of United States Attorney H. M. Ray in the U. S. District Court for the Northern District of Mississippi on January 21, 1963, in which it said that the complaint against the plaintiff was dismissed "without prejudice," the defendant, The Associated Press, reported (P-3E, p. 2021):

"Charges were dismissed today against former Maj. Gen. Edwin A. Walker and six other persons arrested in connection with desegregation riots at the University of Mississippi last fall.

"U. S. Atty. H. M. Ray of Oxford asked for the dismissals several hours after a federal grand jury adjourned without indicting the seven.

"U. S. District Judge Claude F. Clayton of Tupelo, Miss., granted the dismissal 'without prejudice'—meaning that the charges could be reinstated at any time before the Statute of Limitations expires in five years. . . ."

The plaintiff contended that this news dispatch, which explained the significance to the general public of the term "without prejudice" and correctly reported the facts, showed malice on the part of the defendant, The Associated Press; in that it did not, in substance, indicate that the plaintiff had been exonerated from the criminal charges against him by a grand jury. (R. 2529-2530, 2648-2649)

This contention is obviously without substance.

The plaintiff admits that the explanation given for the meaning of the technical term "without prejudice," as set forth in the news dispatch, is correct. (R. 2529-2530)

The defendant, The Associated Press, sent out bulletins and news dispatches reporting the entire proceeding about General Walker's arrest and the subsequent dismissal of the charges pending against him. The explanation of the term "without prejudice" was merely a part of those reports. There is nothing to indicate or suggest that the purpose of the explanation was for any reason other than to inform the reader of the meaning of a legal term with which the average reader is not usually acquainted.

It was gross error to admit in evidence and to try out the accuracy or inaccuracy of the news dispatches that have been cited for the purpose of showing that the publications upon which this action was based were made actual malice.

Appendix C

The Supreme Court of the United States, in a series of decisions during the last two years, had held that proof of malice is confined to calculated falsehood or reckless disregard of the truth.

New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964)
Garrison v. Louisiana, 379 U.S. 64, 85 S. Ct. 209 (1964)
Henry v. Collins, 380 U.S. 356, 85 S. Ct. 992 (1965)
Rosenblatt v. Baer, ... U.S. ..., 86 S. Ct. 669, 34 LW 4111 (1966)

In *Rosenblatt v. Baer,* the Supreme Court said in an opinion by Mr. Justice Brennan (86 S. Ct. at 675):

> ". . . Under the instructions, the jury was permitted to find that negligent misstatement of fact would defeat petitioner's privilege. That test was rejected in *Garrison,* 379 U.S., at 79, 85 S. Ct., at 218, where we said, 'The test which we laid down in *New York Times* is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth.' The trial court also charged that '(d)efamatory matter which constitutes comment rather than fact is justified if made without malice and represented fair comment on matters of public interest' and defined malice to include 'ill will, evil motive, intention to injure . . .' This definition of malice is constitutionally insufficient where discussion of public affairs is concerned; '(w)e held in *New York Times* that a public official might be allowed the civil remedy only if he

establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true.' *Garrison*, 379 U.S. at 74, 85 S. Ct., at 215."

The news dispatches which the plaintiff offered in evidence to show malice have no tendency whatsoever to show that the publications complained of were made with knowledge of their falsity or in reckless disregard of the truth.

ASSIGNMENT OF ERROR NO. 6

The District Court erred in failing to sustain the Exception of Improper Cumulation of Actions insofar as the plaintiff's demand includes claims or causes of action based on conduct, communications or publications alleged to have occured and occurring outside of Caddo Parish, Louisiana, and for the recovery of damage alleged to have been sustained by the plaintiff outside of Caddo Parish, Louisiana, as to which the First Judicial District Court in and for Caddo Parish, Louisiana, is not a court of proper venue.

In considering the exception of improper cumulation of actions filed by the defendants, it is necessary to keep in mind that the plaintiff has not limited his claim to damages resulting from the circulation of The Times-Picayune or The New Orleans States-Item within Caddo Parish or to damages claimed to have been sustained by the plaintiff within Caddo Parish. His demand presents a claim for damages based on the circulation of The Times-Picayune and The New Orleans States-Item outside of Caddo Parish, within the State of Louisiana, throughout the United States and, indeed, the world.

Appendix C

Venue was laid in Caddo Parish, Louisiana, under Article 74 of the Louisiana Code of Civil Procedure, which provides in pertinent part that:

> "An action for the recovery of damages for an offense or quasi-offense may be brought *in the parish where the wrongful conduct occurred*, or in *the parish where the damages were sustained.*"
> (Emphasis added)

The Associated Press is a non-profit membership corporation organized under and existing pursuant to the laws of the State of New York. Its only office and place of business in the State of Louisiana is located in Orleans Parish. The Times-Picayune Publishing Corporation is a corporation organized under the laws of the State of Louisiana, with its registered corporate office and principal place of business located in Orleans Parish. Both The Associated Press and The Times-Picayune Publishing Corporation were served with process in Orleans Parish, Louisiana. Hence, Article 74 of the Louisiana Code of Civil Procedure is the only possible basis upon which the First Judicial District Court in and for Caddo Parish, Louisiana, was a court of proper venue.

Article 463 of the Louisiana Code of Civil Procedure provides in pertinent part that:

> "Two or more parties may be joined in the same suit as plaintiffs or as defendants if: (1) there is a community of interest between the parties joined; (2) *each of the actions cumulated* is within the jurisdiction of the court and *is brought in the proper venue;* and (3) all of the actions cumulated are mutually consistent and employ the same form of procedure."
> (Emphasis added)

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The exception of improper cumulation of actions presents the point that, if the First Judicial District Court in and for Caddo Parish, Louisiana, is a court of proper venue for any claim or cause of action asserted by the plaintiff, it is not a court of proper venue for any claim or cause of action based on the publication or circulation of the alleged libelous statements outside of Caddo Parish, Louisiana, or for the recovery of damages allegedly sustained outside of Caddo Parish, Louisiana.

As a permissive exception to the general rules of venue prescribed in Article 42, which generally require an action to be brought at the domicile of the defendant, Article 74 must be strictly construed. *Anglade* v. *Hemenway Furniture Co.*, 151 So. 2d 164 (La. App. 1963), cert. denied May 14, 1963. Furthermore, one who claims the benefit of an exception to the general rule of venue must clearly bring himself within the exception. *Glover* v. *Mayer*, 209 La. 599, 25 So. 2d 242 (1946).

Under Article 74 of Louisiana Code of Civil Procedure, the venue of a cause of action for an offense or quasi-offense depends upon a showing that:

(1) The wrongful conduct complained of occurred in the parish where the suit is filed; or

(2) The plaintiff sustained damages in the parish where the suit is filed.

In this action, the only wrongful conduct that was alleged or shown to have occurred in Caddo Parish was the circulation of the newspapers containing the alleged libelous statements within Caddo Parish. To that extent, the First Judicial District Court in and for Caddo Parish was a Court of proper venue for the assertion of plaintiff's de-

mand, as this Court held in *Walker* v. *Associated Press*, 162 So. 2d 437 (La. App. 1964). Of course, where Article 74 is invoked on the ground that the alleged conduct occurred in the parish in which the suit is filed, any damages proximately caused by *that* wrongful conduct can be recovered, regardless of *where* the damage is sustained. At the same time, it must be recognized that where wrongful conduct is alleged to have occurred in the parish where the suit is filed and *that* wrongful conduct caused damage in the same parish, the alternative bases for the venue under Article 74 (i.e., wrongful conduct or damages) merely overlap.

However, in stating the rule, the limitations on Article 74 become obvious in the context of the present case. Insofar as the circulation of the newspapers containing the alleged libelous statements outside of Caddo Parish, Louisiana, is concerned, the alleged wrongful conduct did not and could not have occurred within Caddo Parish. Thus, the First Judicial District Court in and for Caddo Parish, Louisiana, is not a court of proper venue under Article 74 for causes of action based on the publication or circulation of the newspapers containing the alleged libelous statements outside of Caddo Parish, unless—and then only to the extent—the plaintiff alleges and shows that he sustained damages in Caddo Parish by reason of the publication or circulation of the libelous statements outside of Caddo Parish. It is not enough that the plaintiff merely claims that he sustained damages in Caddo Parish; any damages claimed to have been sustained in Caddo Parish presumably resulted from the wrongful conduct alleged to have occurred there, namely, the circulation of the newspapers containing the alleged libelous statements within Caddo Parish. That damage cannot be disassociated from the alleged wrongful conduct which produced it.

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In this action, the plaintiff did not allege or prove that he had sustained any damage in Caddo Parish, Louisiana, by reason of the circulation of the newspapers containing the alleged libelous statements outside of Caddo Parish, Louisiana. As Professor McMahon has aptly observed, in connection with *Walker* v. *Associated Press*, supra:

> ". . . (t)he only basis for the Caddo Parish venue was the publisher's wrongful act in circulating its newspapers with the libelous article in that parish. Additional damage was sustained by the plaintiff in other parishes, and throughout the country, but none of this additional damage was sustained in Caddo Parish, and the publisher's wrongful acts which caused this additional damage were not committed in Caddo Parish." McMahon, *Civil Procedure*, 25 La. L. Rev. 433, 436 (1965).

The First Judicial District Court in and for Caddo Parish, Louisiana, is not a court of proper venue with respect to claims asserted by the plaintiff, which were and are based on alleged wrongful conduct occurring outside of Caddo Parish and for damage resulting from that wrongful conduct which was not sustained in Caddo Parish. It follows that the District Court erred in failing to sustain the exception of improper cumulation of action.

The defendants requested the District Court to appropriately instruct the jury at the trial of this action in line with their exception of improper cumulation of actions. (R. 340) The District Court refused to so instruct the jury (R. 386-390) and defendants excepted. (R. 392-393) The requested instruction was eminently correct and proper and should have been granted.

We submit that the exception of improper cumulation of actions should have been sustained.

ASSIGNMENT OF ERROR NO. 7

The District Court erred in failing to hold that Article 74 of the Louisiana Code of Civil Procedure, as applied in this case, is an unconstitutional abridgement of the rights of defendants under the First and Section 1 of the Fourteenth Amendments to the Constitution of the United States.

Article 74 of the Louisiana Code of Civil Procedure, as applied in this action, has a direct tendency to restrict and inhibit the dissemination and circulation of news information and intelligence.

As applied here, Article 74 gives a plaintiff in an action for an alleged libel the right to select as a forum for his suit any of the sixty-four (64) parishes in the State of Louisiana to which any copy of the newspaper carrying the alleged libelous articles may have been sent or received. The danger which this rule carries for newspaper publishers has been recognized time and time again by the highest courts of other states.

Age-Herald Publishing Co. v. *Huddleston*, 207 Ala. 40, 92 So. 193 (1921);

Forman v. *Mississippi Publishers Corporation*, 195 Miss. 90, 14 So. 2d 344 (1943);

O'Malley v. *Statesman Printing Co.*, 60 Idaho 326, 91 P. 2d 357 (1939);

Rives v. *Atlanta Newspapers, Inc.*, 138 S. E. 2d 160 (Ga. 1964);

Hennessey v. *Campbell*, 32 S. W. 390 (Tex. Civ. App. 1930).

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As the Supreme Court of Alabama said, in *Age-Herald Publishing Co.* v. *Huddleston*, supra, at page 198:

> "We do not see how there can be any conflict of opinion as to the unfairness, injustice, or impolicy of permitting aggrieved persons, in this class of cases only, to select at their pleasure any judicial forum within the state where the political religious, industrial, moral, or personal predilections of the local citizenship may readily furnish a jury whose biased views will probably be reflected, however sincerely, in a verdict favorable to them."

In *Houston* v. *Pulitzer Publishing Co.*, 249 Mo. 322, 155 S. W. 1068 (1913), the Supreme Court of Missouri held unconstitutional a statute which would have permitted a plaintiff in a libel action to file suit against a publishing corporation in any county of the state in which the newspaper was circulated. The Supreme Court of Missouri in *Houston* overruled its earlier decision in *Julian* v. *Kansas City Star Co.*, 209 Mo. 35, 107 S. W. 496 (1907), and adopted as the opinion of the court the dissenting opinion filed by Justice Graves in the *Julian case*. The Supreme Court of Missouri, as late as 1962, reaffirmed its conclusion in the *Houston* case that "a statute that would allow one to sue a publishing corporation in any county he chose where the allegedly libelous publications were circulated would be unconstitutional."

Litzinger v. *Pulitzer Publishing Company*, 356 S. W. 2d 81 (Mo. 1962), p. 84.

The constitutional guarantee of freedom of press protects the circulations and distribution of printed matter, as well as the publication itself.

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Lovell v. *City of Griffin*, 303 U. S. 444, 58 S. Ct. 666 (1938);
Talley v. *California*, 362 U. S. 60, 80 S. Ct. 536 (1938).

In *Talley* v. *California*, 362 U. S., at 64, 80 S. Ct., at 538, the Supreme Court declared:

> " 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' "

Indeed, beyond this, the First Amendment rests on the assumption that " 'the widest possible dissemination of information from diverse and antagonistic sources' " is essential to the welfare of the public.

New York Times v. *Sullivan*, 376 U. S. 254, 266, 84 S. Ct. 710, 718 (1964).

Article 74 as applied here is calculated to reduce the press to a timid voice, and to eliminate the "uninhibited, robust and wide-open" debate to which the Supreme Court said in *New York Times* v. *Sullivan*, supra, that our nation was committed.

Article 74, in effect, inhibits geographic circulation. The facts of this case furnish a good example. Of each daily edition of The Times-Picayune, only 257 copies are delivered to Caddo Parish—32 by mail and 225 by carrier and newsstand—out of a total daily circulation of 198,000. (P-36) Of each daily edition of The New Orleans States-Item, only 106 copies are delivered to Caddo Parish—3 by mail and 103 by carrier and newsstand—out of a total daily circulation of 163,000. (P-36) Yet that minimal circulation

in Caddo Parish has been used as the leverage for the imposition of a $2,250,000.00 judgment against The Times-Picayune Publishing Corporation and The Associated Press in solido. The situation inevitably results in a direct tendency to inhibit and restrict the geographic circulation of news information and intelligence.

And it is precisely because of this inhibitive effect that Article 74 violates the First and Fourteenth Amendments to the Constitution of the United States. The First and Fourteenth Amendments protect freedom of speech and freedom of the press from state action which *inhibits*, as well as prohibits, their exercise.

Lamont v. *Postmaster General*, 381 U. S. 301, 85 S. Ct. 1493 (1965);
Grosjean v. *American Press Co.*, 297 U. S. 233, 56 S. Ct. 444 (1936);
Speiser v. *Randall*, 357 U. S. 513, 78 S. Ct. 1332 (1952);
Bantam Books, Inc. v. *Sullivan*, 372 U. S. 58, 83 S. Ct. 328 (1963);
N. A. A. C. P. v. *Button*, 371 U. S. 415, 83 S. Ct. 328 (1963).

What justification can possibly be offered in support of a venue statute such as Article 74 of the Louisiana Code of Civil Procedure which, as applied here, would permit a plaintiff in a case of this nature to arbitrarily select as a forum for his action any one of the 64 parishes in the State of Louisiana to which a single copy of the alleged defamatory report was sent or received and there have his case tried by jury? We submit that there is none, and that the great majority of American states do not permit it. Surely, any

interest that the State may legitimately have in regulating freedom of speech and freedom of the press does not require this exaction. As applied here, Article 74 of the Louisiana Code of Civil Procedure goes far beyond anything reasonably necessary to accomplish a legitimate purpose, and, in doing so, it shackles protected freedoms of speech and press. See *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 63 S. Ct. 1178 (1943).

Furthermore, Article 74 as applied here denies the defendants equal protection of the law, as guaranteed by the Fourteenth Amendment to the United States Constitution. This constitutional guarantee is "a pledge of the protection of equal laws."

> *Yick Wo* v. *Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 1070 (1886)

It protects corporations, as well as individuals, from arbitrary and invidious discrimination in legislative enactments or other state action, whether procedural or substantive in nature.

> *Grosjean v. American Press Co.*, 297 U.S. 233, 244, 56 S. Ct. 444, 47 (1936);
> *Penneckamp v. Florida*, 328 U.S. 31, 66 S. Ct. 1029 (1946);
> *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 47 S. Ct. 678 (1927);
> *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, 262 U.S. 544, 43 S. Ct. 636 (1923).

In *Power Mfg. Co. v. Saunders*, supra, the Supreme Court held that an Arkansas statute which permitted an action against a foreign corporation to be brought in any county deprived the defendant corporation of equal protec-

tion of the law, where the statute governing venue of actions against domestic corporations and individuals was much more restrictive.

Similarly, in *Kentucky Finance Corp. v. Paramount Auto Exchange*, supra, the Supreme Court held that a Wisconsin statute which subjected a foreign corporation to a procedural rule much more onerous and burdensome than it applied to other suitors violated the equal protection clause of the Constitution.

In the course of its decision in *Power Mfg. Co. v. Saunders*, the Supreme Court, 274 U.S. at 495, 47 S. Ct. at 680, pointed out that:

> "It of course rests with the state to prescribe the venue of actions brought in her courts. But exercise of this power, as of all others, must be in keeping with the limitations which the Constitution of the United States places on state action. Procedural statutes are not excepted, but must fall like others when in conflict with those limitations."

These principles apply with equal force to the case at bar.

(I) Assignments of Error 2, 3, 5, 6, 8, 10 and 11, Petition of The Associated Press to the Supreme Court of Louisiana for Writ of Certiorari or Review

ASSIGNMENT OF ERRORS

* * * *

2

The failure of the Court of Appeal to hold that the alleged libelous statements complained of were and are substantially true deprives the Petitioner, The Associated Press, of freedom of speech and freedom of the press in contravention of the First Amendment to the Constitution

of the United States, as made applicable to the States by the due process provisions of Section 1 of the Fourteenth Amendment.

3

The Court of Appeal manifestly erred in failing to hold, under the facts and circumstances disclosed by the record in this case, that the alleged libelous publications, made, as they were, without malice and relating, as they did, to the public speech and conduct of the Respondent, a person of admitted public prominence, who deliberately thrust himself into an area in which matters of profound significance and pressing public concern were at issue, are protected from the claim of libel by the provisions of the First Amendment to the Constitution of the United States, guaranteeing freedom of speech and freedom of the press, which the due process provisions of Section 1 of the Fourteenth Amendment made applicable to the States.

* * *

5

The holding of the Court of Appeal that the alleged libelous publications complained of were made with actual malice is contrary to the fact and the law and deprives the Petitioner, The Associated Press, of freedom of speech and freedom of the press in contravention of the First Amendment to the Constitution of the United States, as made applicable to the States by the due process provisions of Section 1 of the Fourteenth Amendment.

6

The Court of Appeal manifestly erred in failing to hold, under the facts and circumstances disclosed by the record

in this case, that the Petitioner, The Associated Press, was denied the right to due process of law and the right to a fair and impartial trial in the District Court as guaranteed by the due process provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and in allowing the invalid and unconstitutional jury verdict and judgment of the District Court to stand and to influence the decision and judgment of the Court of Appeal.

* * *

8

The failure of the Court of Appeal to hold that the alleged libelous statements here complained of constitute fair comment deprives the Petitioner, The Associated Press, of freedom of speech and freedom of the press in contravention of the First Amendment to the Constitution of the United States, as made applicable to the States by the due process provisions of Section 1 of the Fourteenth Amendment.

* * *

10

The Court of Appeal erred in failing to hold that Article 74 of the Louisiana Code of Civil Procedure, as applied in this case, is an unconstitutional abridgment of the rights of the Petitioner, The Associated Press, under the provisions of the First Amendment to the Constitution of the United States, guaranteeing freedom of speech and freedom of the press, which the due process provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States made applicable to the States, and the rights of the Petitioner, The Associated Press, to due process of law under Section 1 of the Fourteenth Amendment.

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11

The judgment rendered by the Court of Appeal deprives the Petitioner, The Associated Press, of its rights of freedom of speech and freedom of the press under the First Amendment to the Constitution of the United States, which the due process provisions of Section 1 of the Fourteenth Amendment made applicable to the States, and the rights of the Petitioner, The Associated Press, to due process of law under Section 1 of the Fourteenth Amendment to the Constitution of the United States because:

(1) The evidence in this case is constitutionally inadequate and insufficient to support the finding that the alleged libelous publications complained of were false;

(2) The evidence in this case is constitutionally inadequate and insufficient to support the finding that the alleged libelous publications complained of did not constitute fair comment;

(3) The evidence in this case is constitutionally inadequate and insufficient to support the finding that the alleged libelous publications complained of were made with actual malice—that is, with knowledge of their falsity or with reckless disregard of the truth; and

(4) In rendering its judgment, the Court of Appeal relied in substantial part upon a constitutionally invalid verdict reached by a jury that was so dominated by prejudice, which was induced by inflammatory and prejudicial argument by counsel for the Respondent, that it could not fairly and impartially consider the evidence on the issues of truth and malice.

* * *

Appendix C

ASSIGNMENT OF ERROR NO. 2

The failure of the Court of Appeal to hold that the alleged libelous statements complained of were and are substantially true and correct deprives the Petitioner, The Associated Press, of freedom of speech and freedom of the press in contravention of the First Amendment to the Constitution of the United States, as made applicable to the States by the due process provisions of Section 1 of the Fourteenth Amendment.

The record in this case is so lacking in evidentiary support for the holding of the Court of Appeal, that the alleged libelous statements complained of were false, that the judgment rendered by the Court deprives the Petitioner, The Associated Press, of freedom of speech and freedom of the press in contraventoin of the First Amendment of the Constitution of the United States, as made applicable to the States by the due process provisions of Section 1 of the Fourteenth Amendment. *Garrison v. Louisiana,* 379 U. S. 64, 74, 85 S. Ct. 209, 216 (1964); *New York Times v. Sullivan,* 376 U. S. 254, 289, 84 S. Ct. 710, 739 (1964).

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ASSIGNMENT OF ERROR NO. 3

The Court of Appeal erred in failing to hold, under the facts and circumstances disclosed by the record in this case, that the alleged libelous publications, made, as they were, without malice and relating, as they did, to the public speech and conduct of the Respondent, a person of admitted public prominence, who deliberately thrust himself into an area in which matters of profound significance and pressing public concern were at issue, are protected from the claim of libel by the provisions of the First Amendment to the Constitution of the United States, guaranteeing freedom of speech and freedom of the press, which the due process provisions of Section 1 of the Fourteenth Amendment made applicable to the States.

Throughout this litigation, we have insisted—and we still maintain—that the constitutional privilege expounded by the Supreme Court of the United States in *New York Times v. Sullivan*, 376 U. S. 254, 84 S. Ct. 710 (1964), is applicable to the facts and circumstances of this case and, indeed, requires entry of judgment in favor of the Petitioner. In *New York Times*, the Supreme Court held that a public official could recover damages in a civil action for libel only if he established that the libelous publication complained of was false and that the publication was made with actual malice—that is, with knowledge of its falsity or in reckless disregard of the truth. And, in *Garrison v. Louisiana*, 379 U. S. 64, 85 S. Ct. 209 (1964), the Supreme Court held that the *New York Times* rule was applicable to criminal prosecutions for defamation.

Although public officials were involved in both *New York Times* and *Garrison*, it is plain from the reasoning on which those decisions were based that they cannot be

so limited. As the Supreme Court said in *Rosenblatt v. Baer*, 383 U. S. 75, 86 S. Ct. 669, 675 (1966):

> "... The motivating force for the decision in *New York Times* was twofold.... There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. ..."

Both of the interests recognized by the Supreme Court in *Rosenblatt* as requiring the constitutional privilege are clearly present here.

The impressive body of authority now existing leaves no doubt that the principle of *New York Times* and its companion cases applies where, as here, the plaintiff in an action for libel is a person of public prominence—although not a public official—who has thrust himself into the "vortex of the discussion of a question of pressing public concern." The most recent decision on the point is *Walker v. Courier Journal et al.*, F. 2d (6th Cir. 1966) (not yet reported), decided by the Sixth Circuit Court of Appeals on October 28, 1966. In that case, which involved the same Respondent and essentially the same alleged libelous publications that are involved here, the Court of Appeals held (slip op., p. 2):

> "It is apparent, and Appellant alleges in his petition, that he is a person of political prominence, and is a person in a position significantly to influence the resolution of issues of national importance. It is also apparent that Appellant involved himself dramatically into the racial crisis in Oxford, Mississippi; that he 'thrust himself into the vortex of the discussion of a question

of pressing public concern.' *The motivating force of the Times decision compels its applicability here. . . .*" (Emphasis added.)

Accord: *Pauling v. Globe-Democrat Publishing Company,* 362 F. 2d 188 (8th Cir. 1966); *Walker v. The Associated Press,* Col. , 417 P. 2d 486 (1966); *Pauling v. News Syndicate Company,* 335 F. 2d 659 (2nd Cir. 1964); *Pauling v. National Review, Inc.,* 269 N. Y. S. 2d 11 (Sup. Ct. 1966); *Gilberg* v. *Goffi,* 21 App. Div. 2d 517, 251 N. Y. S. 2d 823 (2nd Dept. 1964), aff'd 15 N. Y. 2d 1023, 207 N. E. 2d 620 (1965).

It is indisputable on the record in this case—and undisputed—that the Respondent, General Walker, a person of admitted public and political prominence, voluntarily and deliberately thrust himself into a public arena where matters of profound significance and pressing public concern were at issue. The relevant facts, as set forth under Assignment of Error No. 1, are hereby incorporated by reference.

The Court of Appeal did not reach the question of whether the principle of *New York Times* is applicable to the facts and circumstances of this case, since it found that the publications complained of were made with actual malice. Thus, after devoting some eleven pages of its Opinion to a discussion of the *Times* rule, the Court of Appeal concluded by saying (slip op., p. 20):

"... Resolution of the instant case does not depend upon certain federal and state courts which have extended the New York Times rule to those persons other than public officials or persons in public employment, who thrust themselves 'into the vortex of the discussion of a question of pressing public concern.' ..."

But, on this record, that question must be resolved, for the holding by the Court of Appeal that the alleged libelous statements complained of here were published with actual malice—that is, with knowledge of their falsity or with reckless disregard of the truth—is patently erroneous and wholly untenable, both as a matter of law and as a matter of fact, as hereinafter shown. Thus, the question still remains whether the *New York Times* rule is applicable here. We submit that it clearly is, and that acceptance of the *New York Times* rule requires that the judgment rendered by the Court of Appeal in favor of the Respondent and against the Petitioner be reversed and set aside, and that judgment be entered in favor of the Petitioner.

* * *

ASSIGNMENT OF ERROR NO. 5

The holding of the Court of Appeal that the alleged libelous publications were made with actual malice is contrary to the fact and the law and deprives the Petitioner, The Associated Press, of freedom of speech and freedom of the press in contravention of the First Amendment to the Constitution of the United States, as made applicable to the States by the due process provisions of Section 1 of the Fourteenth Amendment.

While purporting to accept the standard of "actual malice" required by the Federal Constitution, the Court of Appeal has applied it to the evidence here in such a way as to reach a constitutionally impermissible and forbidden result. Moreover, the proposition relied upon by the Court of Appeal in finding malice—inferring malice from falsity—is not a correct application of *New York Times*.

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Under *New York Times*, there must be clear and convincing proof of actual malice. As the Supreme Court said there (376 U. S. at 285, 84 S. Ct. at 728-729):

> "... This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied.... We must 'make an independent examination of the whole record,' * * * [citation omitted] so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."

It is no less the duty of this Court to make the same independent examination of the whole record.

There is no evidence here that the alleged libelous publications complained of were published with knowledge of their falsity, or with reckless disregard of the truth, much less clear and convincing proof. The evidence here is constitutionally inadequate and insufficient to support the Court's finding of actual malice and its judgment based thereon. The Court's finding of malice, therefore, deprives the Petitioner of its rights of freedom of speech and freedom of the press guaranteed by the First Amendment, which the Fourteenth Amendment made applicable to the States.

Under the facts and circumstances disclosed by the record in this case, *New York Times* requires entry of judgment in favor of the Petitioner. If, upon the record in this case, the alleged libelous statements complained of here cannot be published without risking a libel judgment for Seventy-five Thousand Dollars, then freedom of speech and freedom of the press as guaranteed by the Constitution and the protection which the Supreme Court sought to afford those freedoms in *New York Times* are illusions.

Appendix C

ASSIGNMENT OF ERROR No. 6

The Court of Appeal erred in failing to hold that the Petitioner, The Associated Press, was denied the right to due process of law and the right to a fair and impartial trial in the District Court as guaranteed by the due process provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and in allowing the invalid and unconstitutional jury verdict and judgment of the District Court to stand and to influence the decision and judgment of the Court of Appeal.

Due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, requires that a jury verdict and a judgment of the Court be based upon evidence developed at the trial. Where the trial is by jury, due process of law requires a fair trial by a panel of impartial and indifferent jurors. *Turner v. Louisiana*, 379 U.S. 466, 85 S. Ct. 546 (1965); *In re Oliver*, 333 U.S. 267, 68 S. Ct. 499 (1948); *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623 (1955).

A fair, dispassionate and impartial consideration of the evidence developed at the trial by the jury is vital to the validity of the verdict and any judgment based thereon. No verdict or judgment which to any degree is the result of appeals to passion and prejudice, or which is based on anything other than the evidence developed at the trial, can be permitted to stand. *New York Cent. R. Co. v. Johnson*, 279 U.S. 310, 49 S. Ct. 300 (1929); *Minneapolis St. P. & S. S. M. Ry. Co. v. Moquin*, 283 U.S. 520, 51 S. Ct. 501 (1931); *Brabham v Mississippi*, 96 F.2d 210 (5th Cir. 1938); *Ford Motor Co. v. Mahone*, 205 F.2d 267 (4th Cir. 1952); *National Surety Co. v. Jean*, 61 F.2d 197 (6th Cir. 1932).

The evidence here unmistakably shows that the jury was so dominated by bias, passion and prejudice that it could not fairly and impartially consider the evidence. The fact is that the jury returned a verdict for $3,000,000, although the Respondent himself had sought damages of only $2,250,000—this despite the District Court's instructions to the jury that it could not award the Respondent more than he had claimed, despite the fact that the Respondent did not prove or attempt to prove one penny of pecuniary damage, and despite the fact the Respondent did not prove any damage to his reputation. This jury verdict, therefore, was not merely excessive; it was so grossly excessive as to outrun the bounds of reason and leave no doubt that the jury was actuated by passion and prejudice.

Nor can there be any doubt that the highly inflammatory, prejudicial and improper argument of counsel for the Respondent, in his summation, induced and aroused the passion, bias and prejudice of the jury, as indeed it was designed to do.*

Among other things, Chief Counsel for the Respondent made a bold and direct appeal to racial prejudice. Moreover, he made an unwarranted attack upon the Chief Trial Counsel for the Petitioner, charging him, in effect, with suborning perjury. In substance and effect, Counsel for the Respondent told the jury that it was their patriotic duty to return a verdict in favor of the Respondent. He made an extended statement to the jury concerning the political concepts of General Walker and importuned the

*A certified copy of the summation made by Counsel for Respondent is attached to the Motion for a New Trial filed in the District Court. It is also set forth at pages 75-109 of the Appendix to the Original Brief on Behalf of The Associated Press filed in the Court of Appeal.

jury to provide financial support to General Walker to promote his political concepts and philosophy. Whether considered separately or in connection with the conduct of the courtroom spectators—obviously calculated to influence the jury—and the background of prejudicial evidence erroneously admitted, there can be no doubt that the summation of Counsel for the Respondent was calculated to, and did in fact, arouse the bias, passion and prejudice of the jury.

Aside from the appeal to passion, bias and prejudice, Counsel for the Respondent in his closing argument urged the jury to award the Respondent damages of $1,000 for each of the 1250 newspaper members of The Associated Press. There was no evidence offered or received in this case that 1250 newspapers published the alleged libelous news dispatches on which this action is based. Indeed, the District Court had previously ruled that the Respondent's right to recover damages in this action, if any, was limited to such damages as he may have sustained by reason of the publication of the alleged libelous news dispatches in The Times-Picayune and The New Orleans States-Item. The District Court, however, refused to so instruct the jury despite its prior ruling and notwithstanding the statements and arguments of Counsel for Respondent which were thus allowed to go to the jury unchallenged.

There can be no doubt that the jury awarded damages here based upon the publication of the alleged libelous news dispatches in 1250 newspapers. Of course, due process of law requires that the jury verdict and the judgment rendered thereon be based upon evidence developed at the trial. *Turner v. Louisiana*, 379 U. S. 472, 85 S. Ct. 546 (1965); *Garner v. Louisiana*, 368 U. S. 157, 82 S. Ct. 248 (1961); *Thompson v. Louisville*, 362 U. S. 199, 80 S. Ct. 624 (1960).

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Since there was and is no evidence that the alleged libelous news dispatches were published in 1250 newspapers, the jury verdict, therefore, deprived the Petitioner of due process of law. The District Court arbitrarily reduced the jury verdict from $3,000,000 to $2,250,000—the full amount of damage claimed by the Respondent. The Court of Appeal, in turn, amended the judgment of the District Court by arbitrarily reducing the damages to $75,000 and, as so amended, affirmed the judgment of the District Court. The judgment rendered by the Court of Appeal thus rests squarely upon the invalid jury verdict and judgment of the District Court, which the Court of Appeal allowed to stand.

These considerations are, we submit, decisive of the proposition that the jury verdict and the judgment rendered thereon in the District Court violate due process of law, as guaranteed by the Federal Constitution.

That the Court of Appeal did, indeed, rely upon the constitutionally invalid jury verdict in resolving the question of liability is undeniable. Thus, the Court says in its Opinion (slip op., p. 6):

> "... The evidence imposed upon the jury the responsibility of deciding the truth or falsity of the alleged defamatory words and whether they were published with malice. Although the accounts given by these witnesses, particularly as to what plaintiff said in the speech and with respect to his conduct on the campus, are conflicting, the record presents substantial supporting evidence for the jury's verdict, which found to be false the published statements that General Walker took command of and led the crowd."

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For the Court of Appeal to merely search the record to see if there was substantial evidence to support the jury's verdict is clearly not enough. That, to be sure, is simply an application of the "manifest-error" rule in the form that results in the most narrow and restricted scope of appellate review of the facts ever approved in this State. See Robertson, *Appellate Review of Facts in Louisiana Civil Cases*, 21 La. L. Rev. 402 (1961), at pp. 408, 416. The Court of Appeal denied the Petitioner due process of law by placing upon the Petitioner the burden of showing that the findings implicitly made by the biased and prejudiced jury verdict were "manifestly erroneous." *Armstrong v. Manzo*, 380 U. S. 545, 551-52, 85 S. Ct. 1187, 1191 (1965). Due process of law, in the context of this case, required the Court of Appeal to make a fresh appraisal, evaluation and decision of the case, completely independent of and uninfluenced by the jury verdict. The failure of the Court of Appeal to do so denied the Petitioner due process of law.

It is no answer to say, as the Court of Appeal does, that (slip op., p. 22):

> ". . . However, appellants' contentions are without merit as this court is one in which the appeals are upon both the law and the facts. Article 7 § 28 Louisiana Constitution, 1921. We may and do correct any such irregularity. . . ."

To merely reduce the amount of the award, albeit a reduction of $2,175,000, is plainly not enough, however, and that is all that the Court of Appeal did. It allowed the invalid jury verdict and judgment of the District Court to stand in every other way.

A reduction in the amount of damages cannot cure the defect which inheres in a biased and prejudiced verdict, any

more than can a remittitur. Such a verdict is inherently unreliable. As the Supreme Court of the United States said in *Minneapolis St. P. & S. S. M. Ry. Co. v. Moquin*, 283 U. S. 520, 521-522, 51 S. Ct. 501, 502 (1931):

> "... no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. *Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one.* A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent." (Emphasis added)

The invalid jury verdict unquestionably exerted a substantial influence upon the Court of Appeal's determination of this case, as the Court's Opinion makes clear. Since the judgment of the Court of Appeal rests in substantial part upon the constitutionally invalid jury verdict, that judgment is afflicted with the same constitutional infirmities that inhere in the jury's verdict. The judgment of the Court of Appeal is inescapably a "fruit" of the illegal jury verdict. Cf. *Wong Sun v. United States*, 371 U. S. 471, 487, 83 S. Ct. 407, 417 (1963).

* * *

ASSIGNMENT OF ERROR NO. 8

The failure of the Court of Appeal to hold that the alleged libelous statements complained of constitute fair comment derives the Petitioner, The Associated Press, of freedom of speech and freedom of the press in contravention of the First Amendment to the Constitution of the United States, as made applicable to the States by the due process provisions of Section 1 of the Fourteenth Amendment.

In holding that the privilege of "fair comment" was not applicable under the facts and circumstances disclosed

by the record in this case, the Court of Appeal has so limited the doctrine of fair comment as to leave it virtually meaningless and has deprived the Petitioner, The Associated Press, of its rights of freedom of speech and freedom of speech and freedom of the press under the First Amendment to the Federal Constitution. As the Court of Appeal observed (slip op., p. 12), the Supreme Court has already indicated that there are federal constitutional boundaries limiting the extent to which the States can circumscribe the availability and applicability of the privilege of "fair comment." See *New York Times v. Sullivan*, 376 U. S. 254, 292, 84 S. Ct. 710, 732 (1964). Moreover, in *Garrison v. Louisiana*, 379 U. S. 64, 76, 85 S. Ct. 209, 217 (1964), the Supreme Court noted (fn. 10):

> "In view of our result we do not decide whether appellant's statement was factual or merely comment or *whether a State may provide any remedy, civil or criminal, if defamatory comment alone, however vituperative, is directed at public officials. . . .*" (Emphasis added)

The relevant facts, as set forth hereinabove under Assignment of Error No. 1, despite some conflict as to the details, are essentially undisputed. If on the basis of these facts a news medium cannot make the comment in good faith that General Walker "assumed command of the crowd" and "led a charge" of students on the Federal marshals without risking a libel judgment of $75,000, then the freedoms of press and speech guaranteed by the Federal Constitution become illusory.

In this case, there has been no finding that any of the underlying facts set forth in the articles were false, but rather that the Petitioner's conclusion or opinion of General Walker's role, based on the facts contained in the articles

and developed at the trial, was not a "fair comment." Obviously, any comment critical of General Walker would not have been considered "fair" by the jury, under all of the circumstances of the trial.

Where, as here, the privilege of "fair comment" is rejected by the Court of Appeal on the basis of an unsupported assumption and an unarticulated limitation which are relied upon to impose a liability of $75,000, it is obvious that the libel laws have been used to achieve a result which the Federal Constitution prohibits. If the decision of the Court of Appeal is permitted to stand, the only prudent course for the press to follow would be to refrain from commenting on events—however significant and newsworthy—where such comments may reflect unfavorably upon a participant in a public controversy arousing deep emotional responses. For all practical purposes, the doctrine of fair comment, as limited by the Court of Appeal in this case, would be of no avail and useless as a protection for the news media involved in such controversies.

The alleged libelous statements complained of here are plainly within the boundary of fair comment as protected by the Federal Constitution. The evidence in this case is constitutionally inadequate and insufficient to support the implicit finding by the Court of Appeal that the alleged libelous statements complained of did not constitute fair comment. The judgment of the Court of Appeal, therefore, violates the First Amendment, guaranteeing freedom of speech and freedom of the press, which the Fourteenth Amendment made applicable to the States.

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* * *

ASSIGNMENT OF ERROR NO. 10

The Court of Appeal erred in failing to hold that Article 74 of the Louisiana Code of Civil Procedure, as applied in this case, is an unconstitutional abridgement of the rights of the Petitioner, The Associated Press, under the provisions of the First Amendment to the Constitution of the United States, guaranteeing freedom of speech and freedom of the press, which the due process provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States made applicable to the States, and the rights of the Petitioner, The Associated Press, to due process of law under Section 1 of the Fourteenth Amendment.

The Court of Appeal passed off the question of the constitutionality of Article 74 of the Louisiana Code of Civil Procedure with the observation that this Court and the Supreme Court of the United States had declined to consider the issue (slip op., pp. 26-27).

The circumstance that the Supreme Court of the United States declined, at that time, to consider the constitutional question presented cannot be construed as indicating any view on the merits of the issue. The Supreme Court has jurisdiction only over "final judgments or decrees." 28 U. S. C. § 1257. As a general rule, a judgment is not final within the meaning of that provision unless it terminates the litigation on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined. *Parr v. United States,* 351 U. S. 513, 76 S. Ct. 912 (1956). Thus, the Supreme Court may well have viewed the ruling of the Court of Appeal and this Court on the exception of improper venue as an interlocutory ruling which, at best, was only a step toward the ultimate disposition of the case

and not in itself reviewable as a final judgment. See *Catlin v. United States*, 324 U. S. 229, 65 S. Ct. 631 (1945); *Cincinnati Street R. Co. v. Snell*, 179 U. S. 395, 21 S. Ct. 205 (1900). Hence, the dismissal of the appeal by the Supreme Court of the United States does not possess the significance attributed to it by the Court of Appeal.

Similarly, the denial by this Court of the Petitioner's application for a writ of certiorari or review to consider the ruling of the Court of Appeal on the exception of improper venue is not conclusive of the issue, since the special plea of unconstitutionality had not been passed upon either by the District Court or the Court of Appeal. See, e. g., *Board of Com'rs v. Trouille*, 212 La. 152, 31 So. 2d 700, 701-702 (1947).

Thus, the point still remains that Article 74 of the Louisiana Code of Civil Procedure, as construed and applied in this case, is clearly unconstitutional. See *Houston v. Pulitzer Publishing Co.*, 249 Mo. 332, 155 S. W. 1068 (1913); *Litzinger v. Pultizer Publishing Company*, 356 S. W. 2d 81 (Mo. 1962).

As applied here, Article 74 gives a plaintiff in an action for libel the right to select as a forum for his suit any of the sixty-four (64) parishes in the State of Louisiana to which any copy of the newspaper carrying the alleged libelous articles may have been sent or received. The unfairness, injustice and impolicy of that rule is so obvious and so well recognized that we do not feel obliged to belabor the point here. *Age-Herald Publishing Co. v. Huddleston*, 207 Ala. 40, 92 So. 193 (1921); *Forman v. Mississippi Publishers Corporation*, 195 Miss. 90, 14 So. 2d 344 (1943); *O'Malley* v. *Statesman Printing Co.*, 60 Idaho 326, 91 P. 2d 357 (1939); *Hennessey* v. *Campbell*, 32 S. W. 2d 390 (Tex. Civ. App. 1930).

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Nor do we feel obliged to belabor in this Court the point that the constitutional guarantees of freedom of speech and freedom of the press protect the circulation and distribution of printed matter, as well as the publication itself. It is well settled. See, e. g., *Lovell* v. *City of Griffin*, 303 U. S. 444, 58 S. Ct. 666 (1938); *Talley* v. *California*, 362 U. S. 60, 80 S. Ct. 536 (1960).

Article 74 of the Louisiana Code of Civil Procedure, as applied here, inhibits geographic circulation of news information and intelligence. As a result, Article 74 violates the First and Fourteenth Amendments to the Constitution of the United States. The First and Fourteenth Amendments protect freedom of speech and freedom of the press from State action which *inhibits*, as well as prohibits, their exercise. *Lamont v. Postmaster General*, 381 U. S. 301, 85 S. Ct. 1493 (1965); *Grosjean v. American Press Co.*, 297 U. S. 233, 56 S. Ct. 444 (1936); *Speiser* v. *Randall*, 357 U. S. 513, 78 S. Ct. 1332 (1958); *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 83 S. Ct. 631 (1963); *N. A. A. C. P. v. Button*, 371 U. S. 415, 83 S. Ct. 328 (1963).

As applied here, Article 74 of the Louisiana Code of Civil Procedure goes far beyond anything reasonably necessary to accomplish a legitimate purpose, and, in doing so, it shackles protected freedoms of speech and press. As construed and applied here, Article 74 is so unreasonable, so burdensome and so oppressive that it cannot be permitted to stand.

Furthermore, Article 74 of the Louisiana Code of Civil Procedure denies the Petitioner equal protection of the law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States. It subjects the Petitioner, newspapers and other communications media in general in this one class of actions to venue provisions much more

onerous and burdensome than are applied to other litigants in tort actions generally. In no other class of actions, tort or otherwise, is a plaintiff permitted such a broad and wide latitude in the choice of a forum to hear his complaint. Compare *Coursey v. White,* 184 So. 2d 625 (La. App. 1966), and *McMickle v. O'Neal,* 183 So. 2d 377 (La. App. 1966). As construed and applied here, Article 74 constitutes nothing less than arbitrary and invidious legislative discrimination against newspaper defendants in an action for alleged libel.

Thus, Article 74 of the Louisiana Code of Civil Procedure denies the Petitioner equal protection of the law. *Yick Wo v. Hopkins,* 118 U. S. 356, 6 S. Ct. 1064 (1886); *Grosjean v. American Press Co.,* 297 U. S. 233, 244, 56 S. Ct. 444, 447 (1936); *Pennekamp v. Florida,* 328 U. S. 331, 66 S. Ct. 1029 (1946); *Power Mfg. Co. v. Saunders,* 274 U. S. 490, 47 S. Ct. 678 (1927); *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.,* 262 U. S. 544, 43 S. Ct. 636 (1923).

For these reasons, we submit that the Court of Appeal erred in failing to hold that Article 74 of the Louisiana Code of Civil Procedure, as applied here, is unconstitutional.

ASSIGNMENT OF ERROR NO. 11

The judgment rendered by the Court of Appeal deprives the Petitioner, The Associated Press, of its rights of freedom of speech and freedom of the press under the First Amendment to the Constitution of the United States, which the due process provisions of Section 1 of the Fourteenth Amendment made applicable to the States, and the rights of the Petitioner, The Associated Press, to due process of law under Section 1 of the Fourteenth Amendment to the Constitution of the United States because:

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(1) The evidence in this case is constitutionally inadequate and insufficient to support the finding that the alleged libelous publications complained of were false;

(2) The evidence in this case is constitutionally inadequate and insufficient to support the finding that the alleged libelous publications complained of did not constitute fair comment;

(3) The evidence in this case is constitutionally inadequate and insufficient to support the finding that the alleged libelous publications complained of were made with actual malice—that is, with knowledge of their falsity or with reckless disregard of the truth; and

(4) In rendering its judgment, the Court of Appeal relied in substantial part upon a constitutionally invalid verdict reached by a jury that was so dominated by prejudice, which was induced by inflammatory and prejudicial argument by counsel for the Respondent, that it could not fairly and impartially consider the evidence on the issues of truth and malice.

Much of what has already been said is equally applicable here. The evidence in this case, as we have said, is constitutionally inadequate and insufficient, under the First Amendment to the United States Constitution, which the Fourteenth Amendment made applicable to the States, to support the findings of the Court of Appeal that the alleged libelous statements complained of are false, did not constitute fair comment, and were made with actual malice. To avoid repetition, we respectfully refer the Court to what has been said and the authorities cited under Assignments of Error Nos. 1, 2, 4, 5, 7 and 8. What has been said with

respect to each of these Assignments of Error is hereby incorporated by reference.

Furthermore, it is a denial of due process of law, guaranteed by Section 1 of the Fourteenth Amendment, to enter judgment for $75,000.00 against the Petitioner and The Times-Picayune Publishing Corporation based on findings of falsity and actual malice, since there is no evidence to support those findings. *Thompson v. Louisville,* 362 U. S. 199, 80 S. Ct. 624 (1960); *Garner v. Louisiana,* 368 U. S. 157, 82 S. Ct. 248 (1961); *Shuttlesworth v. Birmingham,* 382 U. S. 87, 86 S. Ct. 211 (1965).

The Court of Appeal deprived the Petitioner of its rights of freedom of speech and freedom of the press guaranteed by the First Amendment and its right to due process of law under Section 1 of the Fourteenth Amendment in another respect. There can be no doubt that the constitutionally invalid jury verdict exerted a substantial, if not controlling, influence upon the Court of Appeal's determination of this case. Since the judgment of the Court of Appeal rests in substantial part upon the constitutionally invalid jury verdict and judgment of the District Court, which the Court of Appeal allowed to stand, the judgment of the Court of Appeal is afflicted with the same constitutional infirmities that inhere in the jury's verdict. The judgment of the Court of Appeal is inescapably a "fruit" of the illegal jury verdict and judgment of the District Court. Cf. *Wong Sun* v. *United States,* 371 U. S. 471, 487, 83 S. Ct. 407, 417 (1963).

Moreover, the Court of Appeal deprived the Petitioner of due process of law when it imposed upon the Petitioner the burden of showing that the findings made by the biased and prejudiced jury verdict were "manifestly erroneous." *Armstrong v. Manzo,* 380 U. S. 545, 551-52, 85

S. Ct. 1187, 1191 (1965). Due process of law required the Court of Appeal to wipe the slate clean, and make a fresh appraisal, evaluation and decision of the case, completely independent of and uninfluenced by the jury verdict. The Court of Appeal did not do so, and its failure to do so deprived the Petitioner of due process of law.

This point is more fully discussed under Assignment of Error No. 6. What was said with respect to that Assignment of Error is hereby incorporated by reference.

APPENDIX D

EXCERPTS FROM NEWS DISPATCHES INVOLVED

(a) Excerpt From News Dispatch Prepared by The Associated Press and Published in The Times-Picayune, Oct. 1, 1962 (Pl. Exh. 17)

"Then former Maj. Gen. Edwin A. Walker led a charge of about 1000 of the students against the marshals, still holding their positions around the red brick administration building.

"The students moved in on the marshals throwing bottles and rocks and bricks.

"The attackers backed up.

"Walker said his student force would regroup and charge again.

"The second wave of rioting took the form of a direct charge on the marshals holding guard posts shoulder to shoulder outside the administrative building.

"Walker, an outspoken advocate of Mississippi resistance to federal court desegregation orders, commanded the 101st Airborne in the Little Rock desegregation in 1957. Now retired, he says he was "on the wrong side" then.

"The students rushed the marshals with bricks and soft drink bottles flying. Some of them wore gas masks.

"But the marshals turned them back with their gas launchers."

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(b) Excerpt From News Dispatch Prepared by The Associated Press and Published in The Times-Picayune, Oct. 2, 1962 (Pl. Exh. 20)

"Walker has been firing verbal volleys at one person after another in accusing "three decades of Potomac pretenders" of conspiring "in the liquidation of our constitutional government." But except for punching a reporter here last April he steered clear of violence until he led rioters on the University of Mississippi campus Sunday night.

"Sunday night, two days later, Walker was rallying mob attacks against the marshals at the university in these words:

" 'If you can't win, go home. Don't stay at the university. But let's not quit; we can win.'

"Walker, who doesn't reject the description of "super-patriot" applied to him, has said all his actions are part of his fight against international communism. He has complained that he was "framed in a den of inquity." [sic]

(c) Excerpt From News Dispatch Prepared by The Associated Press and Published in The Times-Picayune, Oct. 2, 1962 (Pl. Exh. 23)

"Little Rock was a skirmish. Oxford is a war.

"The riots just five years ago in the capital of Arkansas were ugly and dangerous. In Oxford, the ugliness and danger is magnified to a gigantic scale.

"And one of the ironies of the situation here is that former Maj. Gen. Edwin A. Walker, who commanded the federal troops that took over Little Rock, is on the opposite side of the fence here.

"Several days ago, Walker said he planned to lead "tens of thousands" of volunteers to aid the cause of Gov. Ross Barnett.

"But his only troops Sunday night were a band of students and other persons whom he led in a charge on the positions of the federal marshals.

"They got within 100 feet but the tear gas fumes repelled them."

(d) News Dispatch Prepared by The Associated Press and Published in The New Orleans States-Item, Oct. 3, 1962 (Pl. Exh. 3, pp. 62-63)

BY VAN SAVELL

Oxford, Miss., Oct. 3 (AP)—Utilizing my youth to the fullest extent, I dressed as any college student would and easily milled among several thousand rioters on the University of Mississippi campus Sunday night.

This allowed me to follow the crowd—a few students and many outsiders—as they charged federal marshals surrounding the century-old Lyceum Building. It also brought me into direct contact with former Army Maj. Gen. Edwin A. Walker, who is now under arrest on charges of inciting insurrection and seditious conspiracy.

Walker first appeared in the riot area at 8:45 P.M. Sunday near the University Avenue entrance about 300 yards from the Ole Miss Administration Building.

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He was nattily dressed in a black suit, tie and shoes and wore a light tan hat.

The crowd welcomed Walker, although this was the man who commanded the 101st Airborne Battalion during the 1957 school integration riots at Little Rock, Ark. One unidentified man queried Walker as he approached the group.

"General, will you lead us to the steps?"

I observed Walker as he loosened his tie and shirt and nodded "Yes" without speaking. He then conferred with a group of about 15 persons who appeared to be the riot leaders.

The crowd took full advantage of nearby construction work. They broke new bricks into several pieces, took survey sticks and broke soft drink bottles.

Walker assumed command of the crowd, which I estimated at 1,000 but was delayed for several minutes when a neatly dressed, portly man of about 45 approached the group. He conferred with Walker for several minutes and then joined a group near the front.

Two men took Walker by the arms and they headed for the Lyceum and the federal marshals. Throughout this time, I was less than six feet from Walker.

This march toward tear gas and some 200 marshals was more effective than the previous attempts. Although Walker was unarmed, the crowd said this was the moral support they needed.

We were met with a heavy barrage of tear gas about 75 yards from the Lyceum steps and went a few feet further when we had to turn back.

Before doing so, many of the rioters hurled their weapons—the bricks, the bottles, rocks and wooden stakes —toward the clustered marshals.

We fled the tear gas and the charging marshals—the crowd racing back to a confederate soldier's statute near the Grove entrance below the Lyceum.

I went to a telephone. A few minutes later I returned and found Walker talking with several students. Shortly thereafter, Walker climbed halfway up the Confederate Monument and addressed the crowd.

I heard Walker say that Gov. Ross Barnett had betrayed the people of Mississippi.

"But don't let up now," he said. "You may lose this battle but you will have been heard."

He continued:

"This is a dangerous situation. You must be prepared for possible death. If you are not, go home now."

There were cheers. It was apparent that Walker had complete command over the group.

By this time, it was nearly 11 P. M. and I raced to the telephone again. Upon my return, Walker was calmly explaining the "new frontier" Government to several bystanders. He remained away from the rioting throughout the next few hours, but advised on several tactics.

One Ole Miss student queried the former General, "What can we use to make the tear gas bombs ineffective? Do you know of any way that we can attack and do some damage to those damn marshals?"

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Walker sugested the use of sand to snuff out the tear gas. "This stuff works well, but where can you get it?" He asked.

At this time the rioters were using a University fire truck and five portable fire extinguishers in an attempt to make the tear gas bombs ineffective.

I left Walker and walked about 100 yards away where Molotov Cocktails—gasoline in bottles with a fuse—were being made.

Again I left the area for a telephone. As I walked toward a dormitory with George Bartsch of the Little Rock Associated Press Bureau, we were attacked by marshals who mistook us for students. We were deluged by tear gas, manhandled, handcuffed and beaten with clubs during a 200-yard walk back to the Lyceum Building.

Thanks to recognition from Chief Marshal James P. McShane, we were quickly released and given freedom in the marshals' headquarters.

Within minutes rifle and shotgun fire erupted from the rioting crowd and two men—one a French newsman—were killed. We considered ourselves lucky to have been arrested and glad to be behind closed, heavily guarded doors.